UNIVERSITY OF PENNSYLVANIA

THE DEVELOPMENT OF INTERNATIONAL RECIPROCITY FOR THE PREVENTION OF DOUBLE INCOME TAXATION

JOHN GOODWIN HERNDON, JR.

A THESIS

IN POLITICAL SCIENCE

PRESENTED TO THE FACULTY OF THE GRADUATE SCHOOL IN
PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR
THE DEGREE OF DOCTOR OF PHILOSOPHY

PHILADELPHIA
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INTERNATIONAL INCOME TAX RECIPROCITY

CHAPTER I

INTRODUCTION

§ 1. Need for a Definition of Terms.
§ 2. Definition of International.
§ 3. Definition of Reciprocity.
§ 4. Definition of Prevention.
§ 5. Definition of Double Taxation.
§ 6. Definition of Income Taxation.
§ 7. Bases for Taxing Income.
§ 8. Origin, Residence and Nationality Theories.
§ 9. When May Double Taxation Exist?
§ 10. Meaning of Residence and Doing Business.
§ 11. The Burden of High Tax Rates.
§ 12. High Rates as International Trade Barriers.
§ 13. Present Interest in This Subject.

Professor Seligman during the summer of 1927 delivered a series of lectures at the Academy of International Law at the Hague, which were published in 1929 under the title "Double Taxation and International Fiscal Coöperation."[1] His original contributions therein were twofold. The first was historical, a careful tracing of evidences of steps taken even in mediæval times to minimize the inconveniences and burdens of double taxa-

[1] Published by The Macmillan Company.

tion. The second was in the field of economic theory, wherein he presented a reclassification of taxes.[2]

The attempt which the present writer will make will be to ascertain what specific recommendations can be made to the governments of the world which have a reasonable chance of being adopted and which, if adopted, would prevent international double taxation.

§ 1. Need for Definition of Terms. Since the subject in hand is the development of international reciprocity for the prevention of double income taxation, the defining of these words, in the sense in which they are subsequently used in this volume, is of primary importance.

§ 2. Definition of International. *International* is to be understood in its ordinary sense. If Dantzig makes an agreement with Germany concerning taxes it is an international agreement so far as this study is concerned. Since the American income tax regulations list those countries[3] which "do not satisfy the similar credit requirement" of the American Revenue Act of 1928 and such list includes "Morocco," any Moroccan-American understanding subsequently effected is to be construed as "international" without in any sense settling the question of Morocco's status as a nation. Refinements of political theory as to whether a certain body politic is a state or nation under international law will be entirely avoided.

§ 3. Definition of Reciprocity. *Reciprocity* as herein used is not employed in a narrow legal sense, but rather in its broadest terms. Reciprocal agreements may be

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[2] That classification extended even to such minute differentiations as semi-personal, demi-personal and quasi-personal taxes.

[3] Regulations 74, Income Tax, Revenue Act of 1928, Article 695(b), p. 218.

treaties. They may arise out of similar provisions in the legislative acts of different governments. They may be in the form of a legislative act of one government and an executive proclamation or decree in another. It is the substance and the spirit which are important and not the forms of the instruments of reciprocity.

§ 4. Definition of Prevention. *Prevention* is employed in a partial rather than a complete sense. The League of Nations reports, hereinafter examined, refer to the *prevention* of double taxation,[4] and in the 1927 edition[5] to measures *to avoid* double taxation. The original questions submitted to the economists who studied the matter from the theoretical standpoint for the League included two which read in part as follows: "Can any general principles be formulated as the basis for an international convention to remove the evil consequences of double taxation . . . ?" and "Are the principles of existing arrangements for avoiding double taxation . . . capable of application to a new international convention?"[6] Whatever the term then, whether avoidance, prevention, or removal of the evil consequences of double taxation, we are interested in steps to eliminate double taxation in so far as particular sources or kinds of income are concerned. It is recognized that these steps are only *toward* prevention. In other words, the complete elimination of double taxation is the goal toward which the movement here studied is headed.

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[4] C. 562 and C. 345 (1928), and its supplement in 1929.

[5] In C. 216, p. 10, reference is made to a draft of a bilateral convention for the *prevention* of double taxation, and in article 1 thereof appears the statement that the convention is designed to *avoid* double taxation. The sense is exactly that of the word used in the French text "éviter."

[6] E. F. S. 73 F. 19, introductory page unnumbered.

§ 5. **Definition of Double Taxation.** *Double taxation,* as used herein, is limited to the taxation of the same income by at least two nations. It is in that sense that the term is employed by the League of Nations. In order to limit the scope of this inquiry there will, therefore, be excluded from consideration income taxes imposed by the governments of states which are members of a federal union as well as those imposed by municipal, county, provincial, departmental, or other subordinate political units. *Double taxation* from the international point of view does not exist when a government uses more than one basis or set of rates for determining the tax due. For example, the British income tax plus its surtax does not *per se* make for double taxation, nor does the American combination of normal tax and surtax on the income of individuals. Even the subjection of corporations to excess profits taxes, and of their stockholders to taxes on the dividends distributed from the remaining earnings, does not fall within the definition of *double taxation* as it is used herein. Of course when international interests are involved in the investments mentioned, double taxation may result, but never solely because of one nation's laws, however complicated or burdensome they may be.

§ 6. **Definition of Income Taxation.** *Income taxation* is used in the sense in which that term is understood in the various countries of the world with whose taxing systems this inquiry is concerned. For example, in certain countries "income taxation" includes taxation of the estimated rental value of one's residence; in others, it does not. We are herein not interested in the question as to whether such values should be taxable, but only in what the national law is. Even though in some cases there may be some relationship between income taxation

and other forms of raising revenue, these other methods will not be of direct concern in this survey. Yet each of these, whether customs duties, fees for the incorporation of businesses, charges for the transfer of securities, sales taxes, or taxation of estates, may all have, and in certain cases do have, international aspects.

§ 7. **Bases for Taxing Income.** There are three principal bases for taxing income.[7] These are (1) to tax items of income at their source irrespective of who receives them; (2) to tax recipients of income in the state where they reside, irrespective of the sources from which it is derived, and (3) to tax a country's nationals on their income, regardless of their residence or the source of their income. The first two bases may be referred to as effective taxation. The third can not be so regarded in the case of the country employing it, in so far as it concerns nationals living abroad and receiving their entire income from sources beyond the jurisdiction of their own country.

§ 8. **Origin, Residence and Nationality Theories.** The three theories can be illustrated in the extreme case of an American who establishes his residence in London and who invests his entire capital in the securities of an Italian company operating exclusively in Italy. Italy would tax the income such a person receives, on the theory that it has an Italian origin. Great Britain would likewise tax it on the theory that the recipient is a resident of Great Britain. Italy's tax would be effective because the property from which the income arises is under Italian jurisdiction. The British tax would likewise be effective because the recipient of the income is under British jurisdiction. But the American govern-

[7] E. F. S. 16, p. 10.

ment likewise asserts that the American in the illustration is subject to American income tax, because of his nationality. It is true that under recent American laws [8] steps toward relieving him from paying the whole or a part of such tax in certain cases have been taken. That fact does not, however, destroy the theory. For had the investment referred to in the illustration been made in Argentina, the American government would have asserted its right to the full amount of the tax on such income just as if it had been received from American sources or by an individual resident within the territorial limits of the United States. But here it is to be noted that such taxation is not effective. Although such a person may be prompted to pay the tax for one of many reasons, such as a sense of patriotism, respect for law, fear of need of subsequent protection or fear of the difficulty of subsequently obtaining passports, nevertheless, the American government cannot compel payment of the tax due.

§ 9. **When May Double Taxation Exist?** Double taxation exists, actually or potentially, therefore, not only when one receives income from sources within one country and lives in another, but also whenever a citizen of A takes up his residence in B and receives even his entire income from B.[9] For example, a rich Mexican whose

[8] The Revenue Act of 1928, section 131(a), the Revenue Act of 1926, sections 222(a) and 238(a), and corresponding sections of the Revenue Acts of 1918, 1921 and 1924.

[9] Regulations 74, Income Tax, Revenue Act of 1928, provide in Article 13 as follows: "In general citizens of the United States, wherever resident, are liable to the tax and it makes no difference that they may own no assets within the United States and may receive no income from sources within the United States. Every resident alien individual is liable to the tax, even though his income is wholly from sources outside the United States. As to non-resident alien individuals, see sections 211–218 and Articles 1021–1091."

entire income is from French sources and whose only residence is in France is liable for both the French and Mexican income taxes. The fact that Mexican or American taxes in the illustration may be difficult of collection does not destroy the fact of the legal existence of double taxation in such cases.

§ 10. Meaning of Residence and Doing Business. Double taxation may also exist whenever an enterprise does business or owns property in more than one country. It may likewise occur whenever a taxpayer maintains permanent residences in more than one country. Yet, what is doing business?[10] What is a permanent residence?[11] There is at present no internationally acceptable legal answer to these two questions.

§ 11. The Burden of High Tax Rates. In the days when rates of tax on income were very low, there was no particular hardship upon persons who were subjected to taxation under the laws of more than one country. With, however, the tremendous increase in tax rates caused by the burden of the World War, the pressure upon persons whose income was subject to tax by different governments became very severe, in some cases running to more than 100 per cent on certain parts of one's income. Indeed even now, when excess profits taxes have been eliminated by substantially all of the governments

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[10] See Brochure 12, p. 13, and Ockenfels v. Boyd, 297 Fed. 614; Flint v. Stone Tracy Co., 220 U. S. 107.

[11] "Domicile has no bearing on the question," Inland Revenue v. Cadwalader, [1904] 7 F. 146; "the test of liability is not having a residence in the United Kingdom, it is residing in the United Kingdom," Turnbull v. Foster, [1904] 7 F. 1; "I think in the sense of the income tax acts a man may reside in more than one place at the same time," Thompson v. Inland Revenue 1918, 56 Sc. L. R. 10. The abovementioned cases are referred to in Brochure 12. Lawrence v. Wardell, 273 Fed. 405, gives the American view.

of the world, very heavy rates still apply to corporation profits and to interest on corporation bonds. Great Britain at present imposes a 20 per cent tax on corporations and so does Germany, while France and Italy apply a 15 and 16 per cent rate respectively. In the case of bond interest, Great Britain and Italy tax it at 20, France at 18, and Germany at 10 per cent.

§ 12. High Rates as International Trade Barriers. Such rates produce real burdens of taxation. But in many cases they operate instead as barriers to international trade. Realizing what the burden of double taxes would be, an enterprise hesitates to enter a foreign field. It knows that most national legislatures are sovereign in tax matters and that therefore after an enterprise has established itself the tax laws can be changed to increase the burden. Thus it seems to such an enterprise to be the part of wisdom to stay out. So the expansion of business suffers and international trade is hampered.

§ 13. Present Interest in This Subject. The International Chamber of Commerce at its organization meeting in June, 1920, realized the seriousness of the tax situation which has been referred to above. Shortly thereafter the League of Nations began a consideration of the same problem. Omitting for the moment mention of various conferences, committee meetings, and congresses held by or under the authority of the two bodies above referred to, it is sufficient in this place to state that 27 governments of the world accepted the suggestion of the League that a general meeting of governmental experts on taxation be held in October, 1928, at Geneva and that this meeting accomplished much: it approved three forms of draft bilateral conventions for the prevention of double taxation of income, and one each dealing with succession

duties, administrative assistance, and assistance in the collection of taxes; and it recommended the establishment of a permanent organization to deal with these and related matters.

Before these various labors are discussed in Chapters III and following, we may appropriately note in Chapter II a few cases of governmental consideration, resulting in treaties or legislative enactments for alleviating the burden of double taxation, which occurred before the World War.

CHAPTER II

PRE-WAR MEASURES

§ 1. Specific Legislation.
§ 2. Netherlands.
§ 3. Belgium.
§ 4. Norway.
§ 5. Switzerland.
§ 6. General Legislation—Netherlands.
§ 7. Treaties for Mutual Assistance.
§ 8. Treaties Covering Specific Commercial Projects.
§ 9. Real Double Taxation Treaties Not Now in Force.
§ 10. Other Treaties Mentioning Taxes Not Now in Force.
§ 11. American Commercial Treaties.

§ 1. Specific Legislation. Prior to the World War, certain legislation was adopted in Holland, Belgium, Norway and Switzerland which is still in force, and which had for its purpose the alleviation of some of the burdens of double income taxation.

§ 2. Netherlands. During the course of the sessions of the Committee of Technical Experts on Double Taxation at London in 1927, a friendly discussion arose between Dr. Sinninghe Damsté, the Dutch representative, and Mr. Mitchell B. Carroll, of the American delegation, as to whether Holland or America had first provided in its tax law for any international reciprocity in taxation. The American Revenue Act of February 25, 1919, provided that an alien resident in the United States might deduct from his American income tax whatever he had paid as income taxes to foreign governments, if those governments granted similar concessions to Americans.[1]

[1] Revenue Act of 1918, section 222(a) and section 238.

In other words, this was a truly reciprocal arrangement. The American Revenue Act of 1921 had provided, moreover, for the reciprocal exemption of maritime shipping profits.[2] When Dr. Damsté told Mr. Carroll that Articles 2 and 3 of the Dutch Income Tax Law of 1914 made the exemption from tax *absolute* in the case of foreign ships, the latter said that this fact proved the correctness of his statement that America had been the pioneer in the movement to provide for *reciprocity* in tax matters. Dr. Damsté said he would investigate the matter further and write to Mr. Carroll on the subject.

Shortly thereafter, Mr. Carroll received a letter from Dr. Damsté in which he called attention to the Act of May 21, 1819—112 years ago—reported in the Official Journal of Laws No. 34, which in Table XVI, subdivision E, provided that foreign ships should be exempt from the payment of a license tax (*droit de patente*) only on condition that the countries whose flag they flew granted similar exemption from tax to Dutch ships. It would seem that undoubtedly this is the first legislative measure dealing with double taxation. While the license tax which the Netherlands' laws imposed was not an income tax, it was a business tax, and may be correctly considered as a forerunner of the present income tax.

Another point of interest in the Dutch law is that the entire income from domestic or foreign sources is reported, and the tax computed. Then there is a concession equal to the amount of tax which would be due if the foreign income were the entire income.[3]

§ 3. **Belgium.** Quite distinct from this method is that which is in use in Belgium. There it has been provided, ever since March 29, 1906, that a resident of Belgium

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[2] Revenue Act of 1921, section 213(b).

[3] F. 212, p. 11.

shall account for his entire income, but that the rate applicable to his foreign income shall be lower than that applicable to his domestic income. At present this concession in favor of foreign income received by residents of Belgium is equal to three-quarters of the tax which would otherwise be due.[4]

§ 4. **Norway.** Norway's Fiscal Law of August 18, 1911, Chapter II, Paragraph 15, provides in part as follows:[5]

> "Persons, companies and organizations domiciled in a foreign country shall be exempt from taxation on their capital invested in, and income derived from, vessels plying to Norwegian ports or between Norwegian ports, and on income from the sale of tickets for the conveyance of persons out of the country, on condition that Norwegian persons, companies and organizations are exempt from taxation on similar operations in the country in question. If this condition is not fulfilled, His Majesty may direct that foreign persons, companies and organizations shall pay tax on their capital invested in, and/or income derived from, the said operations. Nevertheless, in respect of income derived from the sale of tickets for the conveyance of persons out of the country, this provision shall only apply if the sale is effected through an agent or representative within the meaning of the Emigration Act of May 22, 1869 (cf. Law of June 5, 1897, and Law No. 1 of September 16, 1921). His Majesty will issue further regulations regarding the extent of liability to tax and the assessment and collection of tax."

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[4] Brochure 11, p. 9.
[5] C. 345, p. 174.

§ 5. **Switzerland.** Since the various Cantons of Switzerland have never relinquished their individual treaty-making power (international agreements being entered into by the Swiss Federal Council on behalf of particular Cantons) [6] mention is made below of the pre-war double taxation legislation in certain Cantons of the Confederation. Such laws are chiefly concerned with the prevention of double taxation internationally of *property* situated outside of the Canton, and are not, therefore, matters of income taxation at all. There is, however, one exception to be noted.[7] That is paragraph 10(c) of the Taxation Law of the Canton of Thurgau, dated February 15, 1898, which exempts from income tax "inhabitants of the Canton who are owners of or shareholders, etc., in business established abroad, in respect of income derived from such businesses in so far as it is already liable to taxation at the place where the business is carried on."

The Cantons of Appenzell (April 25, 1897), of Obwalden (April 26, 1908), of St. Gallen (Nov. 24, 1903), of Schwyz (Sept. 10, 1854), of Thurgau (Feb. 15, 1898), and of Uri (Oct. 31, 1915) on the dates set opposite their names enacted laws relative to the exemption from tax of foreign-owned *property* of cantonal residents.

In each case the basis for the exemption (partial or complete) was that some other "fiscal sovereign jurisdiction" [8] had already taxed that property.[9] In no case was

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[6] See numerous references to Switzerland in C. 345.

[7] C. 345, p. 206.

[8] This exact phrase appears in a cantonal law of Schaffhausen.

[9] In the taxation laws referred to, the following expressions are used: "That the movable property situated outside the canton is taxed elsewhere" (Appenzell); "Unless it is proved that such property is subject to taxation at the owner's domicile" (Obwalden); "Unless evidence is adduced that such property is taxed abroad" (St. Gallen); "In so far as evidence can be adduced that it is taxed abroad" (Thurgau); "Which can be shown to be taxed outside the canton" (Uri).

there a requirement of intercantonal or international reciprocity.

§ 6. **General Legislation—Netherlands.** The only pre-war legislation still in force which authorized the conclusion of reciprocal agreements along general lines for the elimination of double taxation is found in Article 101 of the previously-referred-to Dutch Income Tax Law of December 19, 1914, which reads as follows:

> "We reserve the right to conclude with foreign Powers, on a basis of reciprocity, conventions for the avoidance, as far as possible, of direct Government taxation of income or portions of income simultaneously in the Netherlands and in the foreign country concerned, either direct or according to the source from which the income in question is derived."[10]

This extract from Dutch law furnishes an illustration of one of the three principal methods used to prevent double taxation, viz., the granting of relief under conditions of reciprocity. A second method is the writing into the national law of an absolute exemption, that is, irrespective of reciprocity. The third is the treaty method.

§ 7. **Treaties for Mutual Assistance.** Belgium entered into treaties with France in 1843,[11] and with the Netherlands and Luxemburg in 1845,[12] covering many subjects of mutual assistance, and these treaties are still in force but they relate only incidentally to taxes and no mention

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[10] Legal Gazette 1914, No. 563, quoted in C. 345, p. 172.
[11] C. 345, p. 211.
[12] Ibid., p. 213.

is made in any of them of double taxation. Their aim was certainly not to prevent double taxation of income. They are properly listed among treaties on the subject only by extending the term to include the furnishing to possibly interested governments of data which they might use as a basis to collect taxes that otherwise would not be levied. Furthermore, in so far as estate or succession duties are involved in those or other treaties we are not here interested, since the subject of this study is limited to income taxation and does not in any extensive sense include mutual assistance agreements.

§ 8. **Treaties Covering Specific Commercial Projects.** On June 27, 1899, Germany entered into a special agreement with Holland concerning taxes to be collected from a railway company which was then constructing a line from Ahaus to Enschede. It was agreed that each government might tax the sections situated in its territory in accordance with its own laws and might assess a "contribution" on the operating proceeds, net or gross, prorated according to the length of each section and the total length of the line.[13] This treaty is still in effect.

Similarly Norway and Sweden agreed on January 18, 1913, that the Luossavaara-Kiirunavaara Company should be taxed on the basis of one-tenth of its income by Norway and nine-tenths by Sweden. This agreement is still in force.

§ 9. **Real Double Taxation Treaties Not Now in Force.** Between 1899 and the outbreak of the World War many other treaties dealing with double taxation were ratified. No others, however, than those mentioned above, are still in force. The first of these now non-operative treaties

[13] C. 345, p. 111.

was ratified on June 21, 1899, by Prussia and the old Austro-Hungarian Empire.[14] A synopsis of it follows:

> Art. 1. Prussian and Austrian nationals shall be liable to direct state taxation only within the state in which they are domiciled, or are resident, except as noted below.
>
> Art. 2. Taxes on landed property and from business enterprises shall be levied only by the state in which such landed property is situated or business conducted. If business is transacted in both Prussia and Austria, taxes shall be levied by each state only on the business transacted therein. Mortgages and the interest therefrom shall be taxed by the state in which the mortgaged property is located.
>
> Art. 3. No change is to be made in existing systems of taxation of interest on bonds, or of annuities or pensions.
>
> Art. 4. Payments for public services shall be taxed only by the state making such payments.

Only Austria-Hungary and the German states developed this idea to any appreciable extent prior to the war. The similarity of their fiscal systems had much to do with this fact. The treaties were simple ones, often concerned with but one or two items. Austria-Hungary made these agreements with Prussia, as mentioned, June 21, 1899; with Lichtenstein, May 18, 1901; with Saxony, January 21, 1903; two with Bavaria, October 6, 1903, and July 3, 1913; with Wurtemberg, February 4, 1905; with Baden, November 7, 1908; and with Hesse, January 3, 1912. Agreements of a similar type were made between Austria and Hungary on October 8, 1907, and extended to Bosnia-Herzegovina on June 9, 1908. Prussia followed suit with Luxemburg on August 10,

[14] E. F. S. 40, F. 15.

1909, and with the Canton of Basle-Town on December 20, 1910. That canton made a double taxation treaty with Baden in 1913, and so did Luxemburg with Hesse.[15]

§ 10. Other Treaties Mentioning Taxes Not Now in Force. In League of Nations Document E. F. S. 40 F. 15 mention is made of pre-war double taxation treaties between Austria and Greece, July 1902—September 1904, Switzerland and Italy, July 13, 1904, Austria and Italy, February 11, 1906, Roumania and Italy, December 5, 1906, and between Greece and Germany, November 18—December 20, 1910. Certain of these related to estate taxes while the others dealt with the rights of commercial travelers, including their exemption from certain taxes.

Thorough examination of volumes of old treaties might reveal that others contain provisions concerning the treatment to be accorded commercial travelers even on matters of taxation. Such an event would not, however, justify their inclusion in a list of treaties on double taxation as that term is used in this book.

§ 11. American Commercial Treaties. In addition to the foregoing, every nation has entered into commercial treaties with certain other nations. In many of these there is a "most-favored-nation" clause. In some of them there is a specific reference to equality of taxation. Most of the American treaties, on the other hand, were negotiated at a time when there was no taxation of income by the Federal Government of the United States, and it is certainly not proper here to include them as being truly double-taxation treaties. A list is furnished, however, of such treaties as are now in force between the United States of America and foreign governments—

[15] The foregoing are mentioned in C. 345, pp. 249–50, and in T. I. B. 523, pp. 2 and 3.

treaties in which there is a guarantee to the nationals of foreign nations, transacting business with or owning or selling property within the United States, of equal treatment to that accorded American nationals, with specific mention of "matters of taxation." [16]

27	July	1853	Argentine	Article X
8	March	1875	Belgium	Article I
16	May	1858	Bolivia	Article III
10	July	1851	Costa Rica	Article IX and XI
11	December	1902	Cuba	Article IX
11	April	1857	Denmark	Article VII
23	February	1853	France	Article VII
4	July	1864	Honduras	Article IX and XI
26	February	1871	Italy	Article XXIII
21	February	1911	Japan	Article I
4	February	1859	Paraguay	Article II
13	December	1856	Persia	Article IV
14	October	1881	Serbia (Jugoslavia)	Article II
16	December	1920	Siam	Article I

Of the foregoing each except the last one is a pre-war treaty.

Similar provisions exist under the following treaties, but the word "taxes" is not used, though "succession duties" and similar phrases are used.

17	November	1880	China
12	December	1846	Denmark
2	March	1899	Great Britain
3	July	1902	Spain
25	November	1850	Switzerland

[16] Handbook of Commercial Treaties, U. S. Tariff Commission, 1923.

CHAPTER III

THE INTERNATIONAL CHAMBER OF COMMERCE

§ 1. Introduction.
§ 2. Resolution Number 11.
§ 3. Significance of That Resolution.
§ 4. Membership of the First Double Taxation Committee.
§ 5. Committee Work Before the London Congress.
§ 6. Fallacies in the Original Plan for Tax Relief.
§ 7. The Committee Not Engaged in Propaganda.
§ 8. Committee Work Before the Rome Congress.
§ 9. Special National Group Proposals.
§ 10. Analysis of Certain of the Foregoing Recommendations.
§ 11. The Rome Congress.
§ 12. Clash of National Views at Rome.
§ 13. Growth of the Committee.
§ 14. Resolutions Adopted March 7, 1924.
§ 15. Analysis of Foregoing Resolutions.
§ 16. The Italian Reservations.
§ 17. Formal Coöperation with the League.
§ 18. Committee Work in 1925.
§ 19. International Shipping Conference Resolutions.
§ 20. Proposals Sent to the Brussels Congress.
§ 21. The Stockholm Congress.
§ 22. At Geneva.

§ 1. Introduction. Just a year after the Treaty of Versailles was signed (June 28, 1919) the organization meeting of the International Chamber of Commerce was held in Paris. In other words, business had seen the necessity of a world clearing house of ideas just as the plenipotentiaries of the States of the world had seen it twelve months before when they provided for the creation of the League of Nations.

§ 2. **Resolution Number 11.** One of the Resolutions adopted by the Organization Meeting of the International Chamber of Commerce was as follows:[1]

> "Resolved, That The International Chamber of Commerce, in meeting duly assembled, composed of representatives of commercial and industrial organizations of the Allied countries, urge prompt agreement between the Governments of the Allied countries in order to prevent individuals or companies from being compelled to pay a tax on the same income in more than one country, taking into consideration that the country to which such individual or company belongs has [a] right to claim the difference between the tax paid and the home tax;
>
> "And further
>
> "That the Board of Directors make representations at once to the governments of the Allied countries concerned and endeavor to secure legislation in their respective countries to carry this resolution into effect."

§ 3. **Significance of That Resolution.** It is significant to note that at the very beginning of the post-war period those who were responsible for the creation of the International Chamber of Commerce realized the importance of double taxation. (Hereafter the term "International Chamber" instead of its longer form will be used just as "League" will usually be when referring to the League of Nations.)

The first item to consider in the resolution quoted above is that the representatives who assembled were those of the commercial and industrial organizations of the Allied countries (using this term here and later in

[1] Brochure 11, p. 3. Retranslated in Brochure 25, p. 14.

its broader sense of "Allied and Associated Powers"), and that their purpose was to urge prompt agreement by their *governments* on certain questions of double taxation. The second item to observe is that a *specific* recommendation was made as to how double taxation was to be avoided, namely by "taking into consideration that the country to which such individual or company *belongs* has [a] *right* to claim the difference between the tax paid and the home tax."

§ 4. Membership of the First Double Taxation Committee. Shortly thereafter a committee on taxation was appointed with M. Gaston Périer, a director of the Banque d'Outre-Mer at Brussels, as chairman.[2] The other members were from six nations, Belgium, France, Great Britain, Italy, the Netherlands and the United States. Although Holland was not one of the Allied nations, she had meanwhile joined the International Chamber, and the first committee appointed included a Dutch representative.

§ 5. Committee Work Before the London Congress. This committee held meetings in Paris in March and April, 1921, and presented to the London Congress of the International Chamber a statement of four principles dealing with income taxes and of one principle applicable to estate taxes. The four income tax principles were:[3]

> "1. With regard to the tax on income earned and collected within the country, from whatever source derived (real estate, personal property, business and professions), without prejudice to the question of super-tax (*impôt global*) on income, each country should accord similar treat-

[2] Brochure 11, p. 3.
[3] Ibid., p. 5.

ment to all taxpayers, both citizens and foreigners, whether resident in the country or not.

"2. (a) With regard to the tax on incomes earned and collected abroad, from whatever source derived (real estate, personal property, business and professions), without prejudice to the super-tax (*impôt global*) on income, a nation should accord similar treatment to all taxpayers subject to this tax (i. e. citizens or foreigners resident in the country or citizens resident abroad). If this class of income cannot be entirely free from liability to taxation, it should be the object of a considerable rebate in consideration of the tax on such income already levied in the country of origin."

"3. (a) With regard to the super-tax (*impôt global*) on income of every class (real estate, personal property, business and professions) it is desirable that each country tax only its own citizens without regard to their place of residence.

"(b) In cases where certain countries cannot adopt this solution they should at least refrain from taxing foreigners resident within their frontiers except by a tax applicable solely to the total income earned in the country itself apart from income earned in other countries.

"4. It is desirable to see the above-mentioned principles applied to companies, etc., in the same manner as to individual persons."

§ 6. **Fallacies in the Original Plan for Tax Relief.** Even at that early date it was realized that the plan for the solution of the problem of double taxation as it had been outlined in the resolution adopted in June 1920 (p. 20) would not work. It was too simple in that it assumed that the national legislatures of Belgium, France, Great Britain, Italy, and the United States could

be persuaded to alter their revenue laws by the adoption of a single method for the alleviation of the burden of double taxation. When the committee studied the tax laws of those countries and of others whose National Chambers had since joined the International Chamber it saw that even that plan would present unsurmountable difficulties. The resolution, if internationally applied, it was seen, could only aid taxpayers where the highest rates of taxation existed. In fact, there was the danger that it might furnish an incentive or an excuse to increase taxes in some countries up to the levels found in certain other countries.

§ 7. The Committee Not Engaged in Propaganda. In 1921 the committee was interested not in the prevention of double taxation but only in the lightening of the burden which existing taxes imposed or in the lowering of the barriers to international trade which such taxes presented. Two facts stand out in connection with the work of the committee.

The first is that it was not the advocate of some *particular* plan which it was interested in having the governments of the world adopt; it was not a propagandist organization. In substantiation of this point it is only necessary to say that the committee subsequently discarded its original plan, changed its concept of the surtax application, and reversed its position on maritime shipping between 1921 and 1925, and decided that its function should be not to alleviate, but to prevent, double taxation.

The second point is that the committee was composed, from first to last, of men who studied the facts and theories presented to it and who tried to evolve therefrom practical plans for the correction of the evils of double taxation. They coöperated wholeheartedly with

the League experts and the League experts with them.[4] The interchange of views between the two groups is an indication of the sympathetic understanding of the need for coöperation between governmental and business representatives if this problem is to be settled on equitable and practical lines.

In this connection it is significant that the brochures of the International Chamber mention the coöperation between its double taxation committee and the committee of technical experts of the League; the publication by the League of all the resolutions of the International Chamber's committee on double taxation; and the praise in the League reports for the assistance rendered the government experts by the International Chamber's committee on double taxation.

Now let us continue to review the International Chamber's work on this subject from 1921 to 1928.

§ 8. Committee Work Before the Rome Congress. The London Congress had met June 27 to July 1, 1921, and approved the resolutions above cited except for slight modifications in the language used but with no change in their sense.[5] On March 1, 1922, the committee held its third session, at which it forwarded to the League an urgent request "to press governments to adopt principles in accordance with the Resolutions of the London Congress."[6] On December 18 and 20, 1922, the committee held a fourth session and approved detailed proposals which were submitted to the Rome Congress for adoption.[7] In order to enable one to trace the growth of

[4] See F. 212, pp. 7, 8, C. 216, p. 7, and C. 562, p. 39.
[5] Brochure 25, pp. 14, 15.
[6] Ibid., pp. 16, 17.
[7] Ibid., pp. 26–28.

certain definite ideas concerning relief from double taxation of income, there is added the following synopsis of those resolutions:[8]

1. There should be no discrimination among taxpayers because of their nationality.

2. There must be an international agreement as to the meaning of *domicile,* applicable to individuals and corporations, but it may be different for these two classes of taxpayers.

It is suggested that the registered office of a corporation be deemed its domicile.

3. Individuals having no domicile should be treated as domiciled in the country of their birth.

Individuals without domicile or recognized nationality should be taxed as if domiciled in their country of residence.

4. In order to obtain tax relief "the interested party must prove that the tax, on account of which he is asking relief, has actually been levied and paid."

5. Relief from tax on income from foreign sources should be "equal to the sum levied by the country or countries in which the income is required."

6. "The relief proposed above might be limited by the country of domicile to a proportion which should not be less than half the taxes levied by the said country on income derived in its own territory."

"The graduated scale of the country of domicile—or of the country of origin—may be applied to the total income of the taxpayer."

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[8] The numbering observed in the synopsis corresponds to the numbering used by the committee. The reason for a synopsis rather than a direct quotation is to avoid the repetition of certain inaccuracies in translation which appear in the English edition.

7a. Income from real estate should be considered as acquired in the country in which the real estate is situated.

7b. Interest from loans and dividends from shares should be considered as acquired either in the country where the corporation issuing the shares is domiciled or where the recipient of the income is domiciled.

7c. Income from movable property should be considered as acquired wherever such property is.

7d. Income from a business or profession should be considered as acquired in the country in which the business is carried on or the profession exercised.

8. "If a business is carried on or a profession exercised in more than one country, the profits derived from such business or profession should be taxed in each country in proportion to the profit realized therein."

9. "Should it be impossible to prove the exact amount of profits accruing in each country, the portions . . . should be determined . . . according to rules to be established by the countries concerned.

10. "In no case should the portions of income taxed in the different countries concerned exceed the total fixed by the competent authority in the country of domicile."

11. The taxpayer should have the right of appeal to an international organization yet to be created, if a dispute arises between himself and any country as to the application of the foregoing principles.

§ 9. **Special National Group Proposals.** Before 1923, each of the national chambers had been asked to submit specific recommendations, and each had done so when the

principles just summarized were approved. There were three practical proposals from the Americans, relating to credit for foreign income taxes paid, reciprocal exemption of shipping profits, and taxation of foreign branches or affiliated companies. In the light of future developments it is interesting to note that the committee, in commenting on the American suggestions, rejected, at least for the time being, the second proposition in the following terms:[9] "As regards the second [recommendation], it did not seem to the committee that maritime trade should benefit by special treatment; therefore the question has been reserved for future more thorough examination."

The French representatives on the committee proposed an amendment[10] to Resolution 7b quoted above, to provide that interest on loans or dividends on shares which in accordance with local legislation are allocated as pledges or reserves, or deposited for surety purposes by branches in foreign countries, should be deemed to be acquired in the country where the debtor is domiciled.

§ 10. Analysis of Certain of the Foregoing Recommendations. The proposals submitted to the Rome Congress differed from the earlier committee recommendations in their definiteness. For example, the second of these recognizes the need for a definition of terms and then suggests it. The fact that the definition subsequently accepted is not at all the same as that enunciated in the paragraph cited is of interest only in tracing the shifts in point of view. Similarly we find in principles 5 and 6 the genesis of the ideas as to refunds, subse-

[9] Brochure 25, p. 20.
[10] Ibid., p. 28.

quently ratified by the League experts, though with considerable variation in method of determination.

Principle 9 has been inserted in all subsequent draft conventions on this subject so far as apportioning income is concerned, but the suggestion found in the second paragraph [11] of that principle has not been approved by the government experts, it being too vaguely expressed. Nor has the tenth principle, that the competent authority in the country of domicile should have any exclusive authority over these matters, met with any subsequent sanction.

All the other principles have been closely followed in subsequent conferences dealing with this subject, but there have been modifications of the rules the committee favored. In fact, almost no group of experts has accepted all these principles as sound, but they have been used as the firm basis on which draft conventions have been built or actual treaties adopted.

§ 11. **The Rome Congress.** When the Rome Congress convened on March 18, 1923, it had before it for the first time a clear statement of the problem (in terms which since then have been regularly used) as it relates to *nationals* and *aliens,* to taxes at the source of income, to residence taxes, to *schedular* or *impersonal* taxes and *total* income (*global* or *personal*) taxes. It is with these words and their full significance that the battles of the experts were waged in 1927 and 1928.

§ 12. **Clash of National Views at Rome.** At Rome it became plain that certain national delegations, notably

[11] Not quoted above. It reads "For example, that portion of the profits realized in each of the countries concerned, other than that in which the business is being worked, would be presumed to be proportional to the whole or a portion of the turnover realized in these countries by the enterprise to be taxed."

the French and Italian, were entertaining views extremely divergent from those held by many of the other delegates on important principles.[12] Because of these circumstances the whole matter was again referred to the Double Taxation Committee.

§ 13. **Growth of the Committee.** Prior to the London Congress the committee had been composed of representatives from Belgium, France, Great Britain, Italy, the Netherlands, and the United States. At the London Congress the committee was enlarged to include members from Denmark, Sweden, Switzerland, Indo-China, and Luxemburg as well as the original member countries except Belgium.[13] At the Rome Congress the committee was again reorganized with only one member allowed each country.[14] Fifteen countries were represented. Professor Suyling, who had ably presided since the London Congress, continued as chairman of the augmented committee. Czechoslovakia, Hungary, Japan, and Norway were represented for the first time; and Belgium's member, the first chairman of the committee, was again able to associate himself in the work to be done. In November, 1923, this enlarged committee met for two days in Paris.[15] Members from eight nations attended, as well as Mr. B. Léon-Dufour, Secretary of the Financial Committee of the League, and certain general officials of the International Chamber. They drew up resolutions which at a subsequent meeting of the committee on February 29 and March 1, 1924, were somewhat amended. At this later meeting ten nations were represented and Mr. Léon-Dufour was again present by invitation.

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[12] Brochure 25, pp. 22, 28, 29–48.
[13] Brochure 25, pp. 15, 16.
[14] Brochure 34, p. 5.
[15] Ibid., pp. 7–9.

§ 14. Resolutions Adopted March 7, 1924. These resolutions follow: [16]

Introduction

In proceeding to the examination of the measures necessary and desirable to counteract the deplorable consequences of Double Taxation, the committee place on record their opinion that the present state of fiscal legislation in different countries imposes upon international commerce and industry taxes which individually are already high and, taken together, constitute burdens so heavy that they paralyze the development of international trade and consequently threaten to endanger the prosperity of Nations.

I

Resolutions Regarding the Double Taxation of Income

1. Since the simultaneous application, in different states, of the principle of the residence of the taxpayer and that of the origin of the income necessarily leads to double taxation, the committee consider that the best means of avoiding this consequence would be to accept the residence as the basis of the tax on income.

They recognize, however, that the application of this principle could not be expected completely to preclude all taxation according to its origin of income derived from landed property or even from commercial or industrial enterprises.

2. In all cases, without exception, where taxation according to origin cannot be avoided, the committee consider that a distinction must be made between taxes affecting income at its origin and those which affect the taxpayer by reason of his residence and are charged on his entire income.

[16] Ibid., pp. 7–9.

They consider it essential that the country of origin should confine itself to taxing incomes accrued within its territory by a tax at the source, at the same time strictly limiting this taxation.

It follows from the above that the country of origin is not entitled to require from the nonresident taxpayer declarations covering any composite part of his income, no matter what its origin may be.

3. The committee consider that in the cases referred to in Article 2, the state of residence should grant to the taxpayer whose income is taxed in the country of origin, relief on account of the taxes paid to the foreign states.

4. The committee recommend the adoption of a uniform definition of fiscal residence.

5. Pending the conclusion of a general Convention on the basis of the principles enunciated in the preceding articles, the committee express the desire to see a general increase in the number of bilateral conventions based on these principles, in order that the different states may thus accord each other, in the interest of their nationals, the benefit of reciprocal reliefs or exemptions.

6. The committee recommend the Council to appoint the following sub-committee to whom the Secretary-General can refer any questions arising in reference to the above conclusions: Prof. J. Ph. Suyling, Prof. Dr. G. W. J. Bruins, Mr. J. Duchénois, Mr. P. Maurice Hill, Mr. J. B. Robinson.

II

Resolution Regarding Double Taxation Affecting the Profits Earned by International Transport

Having taken note of the resolution adopted by the Sea Transport Committee of the International Chamber of Commerce at their meeting

on November 8th, 1923, the committee express the hope that governments will grant, on the basis of reciprocity, exemption from taxation upon profits earned by international transport, to shipping companies not resident or domiciled within their territory.

III

Resolution Regarding Double Taxation in the Matter of Succession Duties

As regards taxes on successions, the committee consider that the abolition of duplication should be pursued in the same spirit as in the case of taxes on income.

§ 15. Analysis of Foregoing Resolutions. Let us examine briefly the foregoing resolutions, for they are important in view of subsequent tendencies in certain cases to mix national policies and economic principles.

The first observation is that in the introduction to the resolutions there is a clear assertion that the consequences of double taxation are deplorable; that the present state of fiscal legislation not only imposes burdens on international industry and international trade, but that it threatens to endanger the prosperity of nations. Thus the committee says that such legislative enactments are tending to kill the goose that lays the golden egg. It implies, too, that any business contemplating embarking on new international undertakings is indeed a goose if those endeavors are to be subject to the caprice of legislators who refuse to think in terms of even their own national welfare.

In the second place there is a clear-cut classification of taxes according to origin of the income or residence of the taxpayer, and the expression of the committee's conviction that really to prevent double taxation the best

method to adopt would be the repeal of all origin taxes. The committee recognized, however, that the tradition for such taxes is too deeply rooted and the financial needs of certain governments too great to expect any such consummation. It then declared that such origin taxes ought to be limited to the income derived from landed property or from commercial or industrial enterprises. It further placed itself clearly on record as opposing any tax on a nonresident which in any way takes into consideration the total of his income or, for that matter, even the composite of his income from sources within the country. Tax the items, it says, if the nation must, but let that be all, in the case of a nonresident. And lastly it favors the increased adoption of bilateral conventions pending the conclusion of a general treaty which will recognize a few definite principles such as it mentions in its resolutions.

On the subject of the reciprocal exemption of foreign shipping, substantial progress in the use of terms is noticeable. It is not the "flag of the ship" which is to settle its tax status; nor the country "under whose laws it is documented," as the American Revenue Acts say, nor the "country of the incorporation of a company" (for maritime navigation), but "where the real headquarters of the business are." There is its "residence." There alone may its profits be taxed. The expression "the real center of management" appears definitely as the accepted phrase by 1925, as we shall note in subsequent chapters.

§ 16. **The Italian Reservations.** On March 7, 1924, the Council of the International Chamber approved the Resolutions above quoted and at the same time noted the reservations insisted upon by the Italian delegate.[17]

[17] Ibid., p. 9, also F. 212, p. 8.

These were, first, that Italy does not accept it as true that the best means of avoiding double taxation would be to have residence as the basis for the tax on income; second, that the bodies of tax law of different nations are too fundamentally at variance to render possible the adoption of any one scheme for the prevention of double taxation; and third, that Italy believes that in the case of all *impôts réels* (*taxes in rem*) origin is a fairer basis than residence.

Here we see stated the first cleavage between the ideas of representation of debtor and creditor nations. The former hold logically enough a preference for, and see in their countries' cases the need of, emphasizing taxation at origin. The latter just as logically recognize the preponderant weight of residence in determining a fair basis to avoid double taxation. The job of the experts was to reconcile the conflicting views.

§ 17. Formal Coöperation with the League. On April 3, 1924, the International Chamber, as a result of the receipt of an invitation from the League, sent a committee to sit with the League's experts, then in session,[18] discussing these same problems.

§ 18. Committee Work in 1925. Eleven nations' representatives gathered for the committee sessions of May 4, 5 and 6, 1925, at which Professor T. S. Adams, of Yale University, presided. In addition there were present officials of the International Chamber, the League, the Transport Group of the International Chamber, and the International Shipping Conference. This group considered three sets of resolutions dealing with the taxation of maritime shipping, which had been adopted by the Japanese National Committee, and approved by the

[18] F. 212, p. 8.

Council of the International Chamber on November 7, 1924, and by the Sea Transport Committee of the International Shipping Conference on April 28 and 29, 1925.[19]

The first of these entreated the Brussels Congress to go on record as endorsing "the exemption of foreign vessels from impositions on their earnings" [20] at least on the basis of reciprocity as found in the British Finance and American Revenue Acts.

The second urged "all maritime countries to avail themselves of this means [reciprocal exemption from taxation of shipping profits] of avoiding double taxation on their shipping." [20] It also recommended to the League that its plan for avoiding double taxation "should include a provision for taxation of shipping profits in the country of domicile alone, subject to reciprocity." [20]

These two resolutions were adopted prior to the issuance by the League experts of their report in February, 1925, on Double Taxation.

§ 19. International Shipping Conference Resolutions. On the other hand the Taxation Committee of the International Shipping Conference met after that report had been out for two months. Its resolutions were based on the League report. A preamble containing six points and four resolutions were adopted.[21] A brief statement thereof follows:

1. Schemes to relieve the shipping industry of the evil effects of double taxation have in the past been failures. "Prevention is better than cure."
2. Draft conventions to prevent double taxation should provide for the taxing of maritime

[19] Brochure 34, pp. 10–11.
[20] Ibid., p. 12.
[21] Ibid., pp. 12–14.

shipping companies at their residence in a positive manner and not as an exception to any rule of taxation of profits by the country of origin.

3. The phrase "subject to reciprocity" must be understood to refer to degree and not to equality of value.

4. The time has come for a single international convention on this matter instead of the multiplication of bilateral agreements.

5. Provisions for assessing taxes at the "fiscal domicile of companies or corporate bodies" should be extended to include "the real center of management" of the business of an individual or a firm even when there is a branch or agency in another country.

§ 20. **Proposals Sent to the Brussels Congress.** The Committee on Double Taxation of the International Chamber at its meeting in May, 1925, considered not only the three sets of resolutions above referred to but also the report and resolutions on double taxation and tax evasion submitted by the Technical Experts to the Financial Committee of the League. It analyzed those recommendations with great pains. On the completion of that work it drafted thirteen resolutions for the approval of the Brussels Congress which was to convene on June 21, and whose sessions lasted until June 27, 1925.[22] Four of the resolutions had no direct reference to the recommendations by the League experts, while nine had. These nine we shall omit here. It is sufficient to say that the League experts carefully considered them in certain subsequent sessions and nearly every one of those nine suggestions has now found its way into at least one of the model draft conventions approved by the General Meeting of Government Experts in Geneva in October, 1928, or the commentaries applicable thereto.

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[22] Ibid., pp. 16–23.

The four other resolutions were as follows:[23]

The committee takes this opportunity of recording its conviction that double taxation is particularly pernicious because its burden is likely to be borne by the borrowing taxpayer or country.

To avoid double taxation, the committee believes that it is necessary to introduce into all fiscal systems a sharp and evident distinction between the impersonal tax (*impôt réel*) which affects income at its origin, and the personal tax which affects incomes at the domicile of the taxpayer. In particular, the committee believes that to assign important categories of the personal tax to the jurisdiction of origin is to confuse the personal with the impersonal tax and to introduce a species of double taxation which it is difficult to remedy either by methods of relief or by means of bilateral conventions.

The committee further wishes to express its appropriation of the suggestion of the Experts that the League of Nations should consider the desirability of summoning a conference of technical experts on broader lines to prepare a draft convention which should give effect to the above-named principles.

The committee respectfully submits the above resolutions to the Brussels Congress of the International Chamber of Commerce, and recommends their adoption. The committee also recommends that these resolutions should be transmitted to the various governments and to the League of Nations. The committee further recommends to the Congress that the Committee on Double Taxation should pursue its work after the Congress as opportunity may arise.

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[23] The first two of these are from paragraphs 1 and 2 on p. 17 and the last two from paragraphs 12 and 13 on p. 23 of Brochure 34.

§ 21. The Stockholm Congress. Two years later the Stockholm Congress met, June 27–July 2, 1927. Two months prior thereto the augmented committee of technical experts whose creation the International Chamber had favored, had met for its third session and had prepared model conventions dealing with double taxation and tax evasion.[24] That committee's report had been issued and studied by the International Chamber's Double Taxation Committee when the Stockholm Congress convened. The latter body adopted the following Resolution:[25]

> A. The Congress of the International Chamber of Commerce
>
> Notes with satisfaction the efforts directed against double taxation thanks to the work done by the Committee of Experts of the League of Nations and by the International Chamber of Commerce, and the harmony existing between the two institutions in the pursuit of the same aim and
>
> Recommends:
>
> 1. That Articles 3 and 10 of draft convention No. 1 (double taxation of income and capital) drafted by the experts of the League of Nations, be so modified as to prevent all confusion even in the case of exceptions, and that the fundamental principle be adhered to that impersonal taxes (*impôts réels*) should be levied at the source by the country of origin, and that personal taxes should be levied by the country of domicile of the taxpayer;
>
> 2. That Article 4 of draft convention No. 2 (double taxation in the case of death duties) state explicitly that capital invested in negotiable securities shall not be subject to death duties ex-

[24] C. 216, pp. 7, and 10–18.
[25] Brochure 60, pp. 21 and 22.

cept in the country of domicile of the deceased owner;

3. That in accordance with the principles already accepted by the International Chamber of Commerce and the Experts' Committee of the League of Nations, the last paragraph of Article 5 of draft convention No. 1 should apply in all circumstances and should not be made optional as suggested in the commentary on that Article.

B. The Congress of the International Chamber of Commerce

Emphasizes the fact, recognized by the experts, that the conclusion of bilateral agreements can only be regarded as a step towards a comprehensive international agreement for the complete abolition of double taxation.

C. The Congress of the International Chamber of Commerce,

While in favour of carefully considered and equitable measures to prevent fiscal evasion, is of the opinion that the causes of fiscal evasion in any state are generally to be found in conditions peculiar to that state, and therefore that measures against fiscal evasion should be directed to suppress the cause rather than to remove the effect;

Notes that the Genoa Conference had already condemned "any proposal to interfere with the freedom of the market for exchange or to violate the secrecy of bankers' relations with their customers"; and

Calls the attention of the League of Nations to the necessity of avoiding anything that might hamper the free play of competition and of economic laws, especially the free movement of capital and the freedom of the market for exchange, or that might violate the secrecy of bankers' relations with their customers, or of income tax returns.

D. The Congress of the International Chamber of Commerce,

Noting the close coöperation which has always existed between the League of Nations and itself in the study of double taxation and the means of remedying the difficulties to which it gives rise,

Resolves to forward the above Resolutions to the League of Nations and to express the wish that the International Chamber of Commerce may be asked to send a delegation to represent Commerce and Industry at the general meeting of government experts which is to take place on this subject in 1928.

§ 22. **At Geneva.** In 1928 the International Chamber received and accepted the invitation referred to in the last paragraph above. It was represented at the Geneva session of October, 1928, by Mr. Robert Julliard, chairman of the Double Taxation Committee and by five assistants. Previously Mr. Julliard's committee had met and had adopted a resolution in favor of extending to air navigation concerns the same principles of taxation as had been laid down concerning maritime shipping. The government experts accepted this proposal without debate.[26]

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[26] For details see Chapter XI following.

CHAPTER IV

THE ECONOMISTS' REPORT

§ 1. Resolution of the Brussels 1920 International Financial Conference.
§ 2. Appointment of the Economists to Study Double Taxation.
§ 3. Their Terms of Reference.
§ 4. Previous Similar Work by Mr. W. H. Coates.
§ 5. Divisions of the Economists' Report.
§ 6. Analysis of the Report: Part I.
§ 7. Analysis of Part II, Section 1-A.
§ 8. Analysis of Part II, Section 1-B.
§ 9. Analysis of the Report, Part II, Section II.
§ 10. Analysis of the Report, Part III, Section I.
§ 11. Analysis of the Report, Part III, Section III.

§ 1. Resolution of the Brussels 1920 International Financial Conference. Prior to the first meeting of the International Chamber's Committee on Double Taxation in March, 1921, the International Financial Conference, held in Brussels in 1920, had adopted the following resolution, which had been proposed by the Commission on International Credits:[1]

> "Apart from the above-mentioned proposals . . . the Conference believes that the activities of the League of Nations might usefully be directed towards promoting certain reforms and collecting the relevant information required to facilitate credit operations. In this connection the Conference considers it well to draw attention to the advantages of making progress under each of the following heads. . . . An international understanding which, while insuring the due pay-

[1] C. 216, p. 5.

ment by everyone of his full share of taxation, would avoid the imposition of double taxation which is at present an obstacle to the placing of investments abroad."

§ 2. **Appointment of the Economists to Study Double Taxation.** Acting on the suggestions contained in that resolution the League decided to refer the study of the question of Double Taxation to its Financial Committee, which in turn[2] asked Professor Bruins (of the Commercial University of Rotterdam), Professor Senator Einaudi (of Turin University), Professor E. R. A. Seligman (of Columbia University, New York), and Sir Josiah Stamp, K. B. E. (of London University) to prepare a report dealing with the theoretical aspects of double taxation.

§ 3. **Their Terms of Reference.** The terms of reference given to these four economists are set forth in Document E. F. S. 253, A. 152.,[3] dated March, 1922, and were as follows:

"(1) What are the economic consequences of double taxation from the point of view:

"(a) of the equitable distribution of burdens;

"(b) of interference with economic intercourse and with the free flow of capital?

"To what extent are these consequences similar in the different types of cases commonly described as double taxation?

"(2) Can any general principles be formulated as the basis for an international convention to remove the evil consequences of double taxa-

[2] E. F. S. 73, p. 3, says "towards the end of 1920"; C. 216, p. 5, says "in September 1921"; F. 212, preface, says "at the end of 1921."

[3] Page 3 thereof.

tion, or should conventions be made between particular countries, limited to their own immediate requirements? In the latter alternative, can such particular conventions be so framed as to be capable ultimately of being embodied in a general convention?

"(3) Are the principles of existing arrangements for avoiding double taxation, either between independent nations (e. g., the Rome Convention) or between the component portions of a federal state, capable of application to a new international convention?

"(4) Can a remedy be found, or to what extent can a remedy be found, in an amendment of the taxation system of each individual country, independently of any international agreement?

"(5) To what extent should the conventions on the subject of double taxation establish an international control to prevent fraudulent claims?"

After nearly a year of correspondence the economists met in Geneva and drew up their report, which was published under date of April 5, 1923, as Document E. F. S. 73, F. 19.

§ 4. Previous Similar Work by Mr. W. H. Coates. It happens, however, that Sir Basil P. Blackett, K. C. B., C. B., had circulated to the Economic and Financial Committee of the League a "Note on the effect of Double Taxation" prepared for him "by an anonymous author"[4] and later published as Document E. F. S. 16. A. 16. 1921, dated May 31, 1921. The professors carefully studied this note and they have summarized as fol-

[4] The author was Mr. W. H. Coates, then of the British Inland Revenue Department, see F. 212, p. 9.

lows[5] its conclusions, which they describe as incontrovertible:

> "(1) Any nonresident investor placing his investment in Morania, knowing it will be subject to taxation there, throws back upon the borrower the burden of the Moranian tax primarily or apparently placed upon himself (the nonresident investor), and, as an investor, is not in this event subject to double taxation (paragraph 8 of the Note).
>
> "(2) Taxation imposed in Morania on investments placed there by investors of other countries will act as an impediment to the movement of capital to Morania. The reason of this restriction of movement is that a marginal quantity of the (e. g.) British capital has by reason of the imposition of the Moranian tax (contracted with freedom from such taxation) been induced to seek other fields of investment (paragraph 12 of the Note).
>
> "(3) Any relief from double taxation given in order to encourage the movement abroad of capital which, in the absence of such relief, finds it unprofitable to move must be extended on practical grounds to all investments, whether old ones or new.
>
> "(4) Taxation imposed in the country of investment, after the date of investment, of a weight greater than that anticipated or provided for by the investor will impose double taxation in a true sense, from which the investor will find it difficult to escape owing to the effect of amortization (paragraph 21 of the Note)."

Mr. Coates holds that the extreme form of the doctrine is "that the investor throws back on the borrowing country the burden of a tax imposed by that country on its

[5] E. F. S. 16, p. 7.

investors."[6] The economists were concerned with questions affecting this doctrine and with the extent of the burden of double taxation and the necessity for and means of remedying it.

§ 5. **Divisions of the Economists' Report.** Their report is divided into three principal parts. Part I deals with the economic consequences of international double taxation; Part II with general principles which govern international competence in taxation, and Part III with the application of these principles. Then follows an addendum entitled "allocation of earnings." A brief summary of their findings is given on pages 9 and 10 of Document F. 212. As the report, which runs to some fifty-odd pages, cannot be quoted here in full, it is given in condensed form, and without critical comment, in the remaining pages of this chapter—the language being that of the present writer but the ideas strictly those of the original Bruins-Einaudi-Seligman-Stamp document.

§ 6. **Analytical Summary of the Report: Part I.** At the outset a distinction must be made between the two classes of economic consequences of double taxation: one is a burden on existing economic rewards, the other an interference with new or potential economic intercourse. (This broad difference between the two classes has already been pointed out.[7]) Taxation in existence at the time an investment is made can scarcely be termed a "burden." One has a sum of money to invest. Will he buy Moranian bonds? The answer must be, he will buy Moranian bonds if their yield, after deducting existing Moranian taxes, is still more than that of other potential purchases, all other factors being equal. Exist-

[6] F. 212, p. 9; E. F. S. 16, p. 38; and E. F. S. 73, p. 10.

[7] See pp. 7–8 hereof.

ing taxes do not, therefore, constitute a burden to the investor. The fact that these taxes may be increased by the Moranian government may deter one from buying its bonds. After the increase has gone into effect a new equilibrium between income and capital will be established, the selling price of the bonds being lower than formerly. Knowing in advance that such a possibility exists acts as a deterrent to making the investment. It is a barrier, rather than a burden.

What the nonresident investor will demand, therefore, is that the net yield to him (disregarding his own country's tax on income) will be at least as great as if he made a corresponding investment at home. If a local company's bonds sell at par and yield 6 per cent, the bonds of a Moranian company of equivalent standing in the security markets must yield a non-Moranian investor at least 6 per cent. Now if the Moranian tax is 10 per cent of the income, that income must be at the rate of 6⅔ per cent to produce a net return of 6 per cent.[8] In other words, the tax is thrown back on the borrower. Technically the investor has been subjected to double tax, the Moranian and his home tax. Actually the increased yield has meant to him that he has escaped the double imposition.

Furthermore, investors who in the past have suffered from increases in taxation on securities of Moranian companies or of the Moranian Government will surely tend to protect themselves from such action again by demanding more than a net yield sufficient to establish an equilibrium between domestic and foreign investments. Thus a burden may develop merely from the possibility of a barrier appearing to similar future transactions. In Morania, "the country in which the investment is made, the tax cannot possibly be a barrier with-

[8] E. F. S. 73, p. 8.

out proving to be a burden or . . . an economic handicap to the Moranian inhabitant."[9]

Old taxes have by the operation of general economic forces tended to become "acclimatised to the holder."[10] The problem of fairness in double-taxation relief consists partially, therefore, in devising a scheme which will differentiate between old and new taxes. There are certain limitations to be noted concerning the preceding doctrine as it relates to the new investor. In the first place the investor may be ignorant of the fact that taxes affect his investment. (This cannot be considered as a serious qualification of the doctrine.) In the second place, a "man is free to make an investment or not to make it, as he wishes, in the case of a wholly new enterprise to be started; but if a man has a going concern with a paramount need for new capital in order to preserve the old capital from extinction, he is not free in the same sense."[11] Next, if graduated rates of tax are involved, it is difficult to see how one can accurately measure the amount of tax to be thrown back on Morania.[12] Then again there may be limitations due to the fluidity of capital and the effects of supply on market conditions.[13]

§ 7. **Analysis of Part II, Section I–A.** The old exchange theory of taxation had two aspects. One was that taxes should be paid in accordance with the cost of the service rendered by government. The other was that the value of particular benefits conferred on individuals corresponded to the amount of taxes which ought to be imposed on them. Supplementing these theories (or

[9] Ibid., p. 9.
[10] Ibid., p. 10.
[11] Ibid., p. 11.
[12] Ibid., p. 14.
[13] Ibid., p. 15.

phases of one theory) came the more comprehensive faculty or *ability-to-pay* theory of taxation. Objection has been made to this theory on the ground that faculty does not attach to things (many of which are taxed) but only to persons. It should be borne in mind however that even taxes on things "are ultimately paid by persons." [14]

With taxes thus definitely associated with persons, it was natural that the political allegiance of persons should become significant in tax laws. Hence there developed the idea that citizenship and taxation should be associated. "In modern times, however, the force of political allegiance has been considerably weakened. The political ties of a nonresident to the mother-country may often be merely nominal. . . . In the modern age of the international migration of persons as well as of capital, political allegiance no longer forms an adequate test of individual fiscal obligation." [15]

Mere "temporary residence is plainly inadmissible" as a proper test for the assessment of taxes. One might on such a principle escape taxation altogether or be subject to multiple levies on the same income or wealth.

Domicile, by which is understood permanent residence,[15] ought not to be the exclusive consideration in determining tax liability. Yet it is more logical than citizenship (political allegiance) being closely allied to economic obligation. Those who live in a place permanently ought to contribute to the payment of its expenses. On the other hand some of those who own property in one state, may live in another, and all the property needs to be protected. Income of the resident population may be derived from outside sources. There is in addition a certain responsibility on the part of all persons to the place where their profits are derived.

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[14] Ibid., p. 18.
[15] Ibid., p. 19.

"A fourth possible principle is that of the location of the wealth." Taxation according to situs has become inadequate under the modern system, in which a distinction is made between location in the case of property and origin in the case of income.

The recognition of the truth of the foregoing statements led the economists to formulate the doctrine of economic allegiance in the following words:[16]

> "Taxes, though measured by things, eventually fall upon persons and ought to fall upon them in the aggregate according to the total resources of of the individual, leading to progressively larger sums being paid by the people who are richer. The point is that when the money has left the pocket of the individual, its destination is not a single one but is due to those governments to whom the individual owes economic allegiance."

§ 8. Analytical Summary of Part II, Section I-B. There are four factors or fundamental considerations which must be examined if one would discover the true meaning of economic allegiance: These are the acquisition of wealth, the location of wealth, the enforceability of the rights to wealth, and the consumption of wealth. The principle of acquisition corresponds to the place of the origin of wealth; location . . . to situs; legal rights to . . . enforcement of the rights to wealth; the principle of consumption . . . or disposition to the place of residence or domicile.[17]

The term "origin of wealth" is concerned with more than the place where the wealth is produced. Human factors are also important. They include superintendence or management of the labor, the transport agencies,

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[16] Ibid., p. 20.
[17] Ibid., p. 23.

the seat and residence of the controlling power that shapes policies, and "the selling end, that is, the place where the agents for selling ply their calling and where the actual markets are to be found." [18] The true economic location may have to be, in certain cases, distinguished from the physical location ordinarily called situs.

The term *domicile* in English-speaking countries is usually understood to mean the place where a person chooses to exercise his political rights, such as voting. Ordinarily it corresponds to permanent residence. In French, however, *domicile* has two distinct aspects. One is legal, the other actual. In German law *Wohnsitz,* like the French *domicile réel,* is the principal or habitual residence. There is need, therefore, of clarification of the meaning of the terms *residence* and *domicile.* This is especially true since most of the measures for relief from double taxation concern the question of origin and residence taxes.

Now the importance of the analysis made in the three preceding paragraphs lies partly in the fact that the tax systems of the principal countries fall into three categories:

> First, taxes, more or less unrelated, upon items of wealth—(*impôts cédulaires*).
>
> Second, the above *impôts cédulaires* plus a sort of surtax on total income (*impôt global sur le revenu*).
>
> Third, a true income tax on total income in which schedules, if used, are used merely for administrative convenience and "having no separate validity or existence except as a part of the whole." [19]

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[18] Ibid., p. 24.
[19] Ibid., p. 26.

The analysis will, moreover, have served a further purpose if it has tended to show "which countries have the greater title in theory to impose specific taxes upon particular forms of wealth" . . . and "to show the extreme complexity of the subject as soon as we are dealing with a tax on pure income."[20]

§ 9. Analytical Summary of the Report, Part II, Section II. The four tests of economic allegiance (origin situs, enforceability, and domicile) were then applied by the economists to each of the following classes of wealth in order to determine which country (that of origin or domicile) is entitled to a tax thereon or on the income therefrom. Their conclusions were are follows:[21]

	CATEGORY OF WEALTH	PREDOMINANT ELEMENT	
		ORIGIN	DOMICILE
I	Land	x	
IIa	Mines, Oil Wells, etc.	x	
IIb	Commercial Establishments	x	
IIIa	Agricultural Implements, Machinery, Flocks, Herds	x	
IIIb	Money, Jewelry, Household Furniture		x
IV	Vessels	x (registry)	
Va	Mortgages	x (property)	x (income)
Vb	Corporate Shares		x
Vc	Corporate Bonds		x
Vd	Public Securities		x
Ve	General Credits		x
VIa	Professional Earnings		x
VIb	Salaries		x

§ 10. Analysis of the Report, Part III, Section I. There are four possible methods by which double taxation may be abolished, all of them involving in one way

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[20] Ibid., p. 27.

[21] Ibid., p. 39. For details as to how the conclusions were arrived at, see ibid., pp. 27–38.

or another the doctrine of economic allegiance.[22] The first of these is the method of *deduction for income from abroad,* effected by deducting from tax the amount of tax paid to foreign countries on income derived from them. In other words, the country of domicile (the creditor nation) bears the burden of taxation imposed by the debtor countries. This method is very similar to the current practice in the United States in regard to its citizens. It is very improbable, however, that the great creditor nations of the world would agree to adopt this policy permanently, for the whole burden of double taxation would fall on them.

The second method is the exact converse of the first, that of *exemption for income going abroad.* Under such a policy the debtor nation (country of investment) foregoes the income from double taxation. However, there would be some compensation because of the increased influx of foreign capital and the development of the less-favored regions. Thus it may be seen that such a method would not result in a burden alone, but might even prove advantageous to the debtor country, particularly if it were growing rapidly and could absorb a large supply of foreign capital.

The third possibility is the *division of the tax,* an attempt to divide the income from taxation between the interested countries. It is an attempt to recognize both principles (origin and domicile). It would leave government securities in an unsatisfactory position and would also be open to some of the objections made to the first method. The most important of these objections is that it puts the treasury of one country at the mercy of increased taxation in another country. It is possible, however, that through treaties and conventions some practicable basis of division might be arrived at and the evils

[22] Ibid., pp. 41, 42.

latent in the system might be prevented from ever occurring.

The fourth alternative is the *classification and assignment of sources by convention.* The classification given in the table on page 51 is typical of that sort of arrangement. The adoption of this method would necessitate very exact analysis because of its extreme complexity. Theoretically, of course, it is the most just of the four methods, but to put it into practice would require very careful handling by the several governments.

§ 11. Analytical Summary of the Report, Part III, Section III.[23] The application of the principles of economic allegiance to income taxation is more difficult and requires a more thorough investigation than the application of the theory to the other taxes studied by the economists.

The system of *deduction for income from abroad* is so grossly unjust to the creditor country and is so open to abuses by the debtor nations that it need not be seriously considered.

The method of *classification and assignment of sources* is too complicated to be practical. Too many classification difficulties would be likely to occur.

The third system, that of *division of the tax,* appears more practical, but there are several grave objections to it. In the first place, a country's relation to the rest of the countries of the world would be very important. For example, a country primarily agricultural (i. e. of origin) would make a very different classification and assignment from what a country of domicile would make. Secondly, the right proportion for a given country to receive in its division with one country might not be

[23] Reference to section II is omitted as it deals only with death duties and property taxes.

correct for its division with another. Then there is the difficulty of determining the actual effects of foreign taxation, and this difficulty increases with the extent of a corporation's operations. A method very similar to this is being tried in the British Empire, but even there, where there is a common language, a great deal of trouble has been encountered.

After the system of division had been tried for a while, it might very possibly be found that the results were substantially the same as though the method of exemption for income going abroad had been used. This latter method would be particularly good between countries of fairly equal economic standing. Besides escaping the complexity of the other two methods that might be used (that of deduction of income from abroad being wholly impractical), this system conforms with the practice of countries wanting to attract foreign capital. And, going back to the theory of the new investor, the burden of a tax would fall on Morania anyway. Thus there is a practical, a theoretical and an administrative background for this method. Between countries distinctly creditor and debtor, the former would certainly approve, because of the ease of administration and the income of the treasury. But the debtor country would object because its rights as a country of origin would be infringed and because its taxable incomes would be materially lessened. On the other hand, there would be an increased international flow of capital, which would be to the distinct advantage of the debtor country. To get some sort of system into practice it might be wise for certain countries to adopt separate conventions providing for the method of classification as modified by that of division. And this might lead to further developments, for experimentation might prove this method practical for all the countries. If it could be found practical it should certainly be

adopted because the element of classification makes possible more just decisions. In the administration of any such alternative, in the beginning at least, the method proposed above should be followed. That is, the country of domicile should apply an appropriate rate and then deduct the amount due to the country of origin.

In concluding the consideration of the application of the theory of economic allegiance to income taxes it may be said that the method of exemption for income going abroad appears to be the most practical, chiefly because of its comparative simplicity. It should be adopted whenever possible. As an alternative, the method of classification and assignment, modified somewhat by a system of division, should be put into practice. In adopting any of these methods for the elimination of double taxation, however, it should be remembered that it is very difficult for foreign governments to secure all the relevant facts from individuals unless there is some financial inducement for the furnishing of such data.[24]

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[24] Ibid., p. 51. The economists' conclusion is stated in the following words:

"(1) On the subject of income taxation in its developed form, the reciprocal exemption of the nonresident under method 2 is the most desirable practical method for avoiding the evils of double taxation and should be adopted wherever countries feel in a position to do so.

"(2) Where method 2 is repugnant owing to a reluctance to abandon the principle of origin, method 4 as modified by method 3 may be the subject of mutual conventions, but even then it is best carried out by an administrative system similar to method 2, supplemented by a collective settlement on agreed lines between the two governments.

"(3) Where countries desire method 4 but do not care to have it carried out by combining method 2 with such an overhead government settlement, they must make the best arrangement they can under method 4, perhaps modified by method 3. But we can hold out no hopes of this proving to be a smooth and practicable agreement. It can only be approximate and not an instrument of that degree of sensitiveness and accuracy which developed communities expect."

CHAPTER V

WORK OF THE TECHNICAL EXPERTS ON DOUBLE TAXATION

§ 1. Double Taxation and the Flight of Capital.
§ 2. The League Again Becomes Interested in Double Taxation.
§ 3. The Appointment of Technical Experts.
§ 4. Report of the Technical Experts, 1925: Part I.
§ 5. Report of the Technical Experts, 1925: Part II.
§ 6. Report of the Technical Experts, 1925: Part IV.
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§ 8. Subsequent Development of Other Resolutions.
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§ 10. Growth of the Committee in 1927.
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§ 13. Classification of Taxes Not in Accordance with American Classification.
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§ 17. Active Participation by United States Desired by Existing Committee.
§ 18. The Enlarged Committee of Technical Experts.
§ 19. Its Invited Advisers.
§ 20. The Committee's Accomplishments.
§ 21. Three of Its Decisions.
§ 22. Its Conclusions as to Future Organization.

§ 1. Double Taxation and the Flight of Capital. Almost a year before the publication of the Report on Double Taxation by the four economists discussed in the previous chapter the League had been requested by the International Economic Conference, meeting in

Genoa, to study the flight of capital, under terms of the following resolution:[1]

> "We have considered what action, if any, could be taken to prevent the flight of capital in order to avoid taxation, and we are of the opinion that any proposals to interfere with the freedom of the market for exchange, or to violate the secrecy of bankers' relations with their customers are to be condemned. Subject to this proviso, we are of the opinion that the question of measures for international coöperation to prevent tax evasion might be usefully studied in connection with the problem of double taxation which is now being studied by a committee of experts on behalf of the League of Nations. We therefore suggest that the League of Nations should be invited to consider it."

§ 2. The League Again Becomes Interested in Double Taxation. In June, 1922, the Financial Committee of the League decided that the time had come to have a study made of the practical side of the question of the prevention of double taxation, since the study of its theoretical aspects had then already been begun, and that a committee should be appointed to investigate tax evasion in accordance with the resolution just quoted.

> "On October 17th, 1922, the Secretary-General of the League of Nations, in accordance with a proposal which was made by the Financial Committee and approved by the Council, requested a number of European countries to state whether they would be prepared to nominate a technical official to sit on a committee formed to study the questions of double taxation and tax evasion. The

[1] C. 216, p. 5.

> Financial Committee considered that 'in order to arrive at any real solution of these two important questions, it was essential to obtain the opinion of the representatives of certain governments. Still better results might be anticipated if a meeting of these representatives were convened in order to discuss the possibility of an agreement to enable common action to be taken upon certain points, and to permit the drawing up of schemes, bilateral agreements and other arrangements concerning double taxation and the evasion of taxation.' ''[2]

§ 3. The Appointment of Technical Experts. The following governments were consulted: Belgium, Czechoslovakia, France, Great Britain, Italy, Netherlands and Switzerland; and each accepted the invitation. The committee thus appointed held five sessions at Geneva at various dates between June, 1923, and February, 1925, each lasting about a week. The chairman of the committee through all its sessions was Dr. Pasquale d'Aroma, the Italian representative, while its secretary was M. Léon-Dufour, secretary of the Financial Committee of the League.

§ 4. Report of the Technical Experts, 1925: Part I. In the report which the technical experts submitted to the Financial Committee of the League they pointed out that their task "consisted in endeavoring to bring about a more equitable international assignment of taxation, to prevent the evil effects of double taxation and to check tax evasion."[3] The experts then continued by reporting:

> "But we have fully recognized that no change can be made in the present condition of affairs without some modification of the domestic legis-

[2] F. 212, p. 3.
[3] Ibid., p. 6.

lation of the various countries or without international conventions.

"We have regarded our task as being that of technical experts endeavoring to prepare the best possible system for remedying the evils of double taxation and tax evasion. We have contributed to the common stock the experience we have gained in our official capacity, and it has been our desire, by omitting consideration of interests of too special a character, that this experience should serve the general interests of all states members of the League, and even non-members. On more than one occasion we have had before us proposals which some of us desired to accept—and indeed have accepted—as technical experts, although they were at variance with our own legislation and even with the general trend of opinion of our governments or their expressed views. We were able to do so because we knew that our agreement or non-agreement to any particular proposal would not in any way bind the governments by which we were nominated."

League Document F. 212, dated February 7, 1925, contains the report and resolutions submitted by the technical experts to the Financial Committee of the League. The section giving their report is divided into four parts. The remarks just above quoted are found in Part I, an introduction to the study. Part II deals with double taxation, Part III with tax evasion and Part IV with general conclusions reached by the experts.

§ 5. Report of the Technical Experts, 1925: Part II. Part II outlines the other investigations previously or simultaneously made;[4] mentions definite attempts hitherto made by governments to solve the problem;[5]

[4] Ibid., p. 7.
[5] Ibid., pp. 10–12.

states that the technical experts have studied existing laws and conventions and the various suggestions forwarded to them by the Institute of International Law and the International Chamber of Commerce;[6] and then gives the reasons for its own resolutions.[7] In doing so it points to the confusion in the meaning of the words regularly used in tax discussions such as *cédulaire* and schedular, *impôts réels, impôts personnels,* taxation "at the source," and "fiscal domicile."[8]

§ 6. **Report of the Technical Experts, 1925: Part IV.**[9] It concludes by recommending (1) that the Council of the League invite other governments to name technical experts to sit on the committee, (2) that the new group be authorized to prepare preliminary draft conventions, and (3) that some specific body already existent or to be created be empowered to settle disputes arising under taxation treaties.[10]

§ 7. **Enunciation of Fundamental Principles.** Three of the resolutions of the committee are vital since they enumerate fundamental principles in the following language:

> 1. "Generally speaking . . . only the state in which the source of income is situated is entitled to impose impersonal or schedular taxes.[11]
>
> 2. "The general income tax, i. e., a tax (which may be at a progressive rate) charged upon the whole income of the taxpayer, from whatever

[6] Ibid., p. 12.
[7] Ibid., pp. 15–21.
[8] Ibid., pp. 13, 15.
[9] Part III is omitted as it does not deal primarily with double taxation of income.
[10] F. 212, p. 29.
[11] Ibid., p. 31.

source derived, should, in principle, be imposed only by the state of domicile.[12]

3. "The precise method of avoiding double taxation must be a matter to be worked out in detail between the states concerned, having regard to the circumstances and nature of their respective fiscal systems." [12]

§ 8. **Subsequent Development of Other Resolutions.** The foregoing and certain other important resolutions of the committee are discussed in detail in Chapter XI of this volume.

§ 9. **Growth of the Committee in 1926.** The Council of the League approved the suggestion of the experts as to the size of the committee and the scope of its further activity. By May 17, 1926,[13] when the first session of the enlarged committee was held in Geneva, invitations had been accepted by Germany, Japan, Poland, and Venezuela in addition to the original seven member States. Germany's delegate was able to lay before the committee a clear statement of the German tax system. Poland's delegate presented a statement showing that, because of his country's varying history, its tax system was necessarily complicated. Japan was able to add the Oriental concepts on this subject and Venezuela the Spanish-American.

§ 10. **Growth of the Committee in 1927.** Argentina next accepted the League invitation to send a delegate to sit on this committee, and shortly thereafter the United States did likewise.[13]

§ 11. **Reasons for American Participation.** To understand the reasons why the American Government took

[12] Ibid., p. 32.

[13] C. 216, p. 7, and Minutes of the Sessions.

this action it is now necessary to examine the 1925 resolutions of the technical experts. In the first place they had classified income taxes as either impersonal, i. e., levied in respect of each kind of income without regard to the status of its recipient; or personal, i. e., based on the entire income of the taxpayer and with regard to his personal status. The general principle that the country of origin ought to have the exclusive right to levy the impersonal tax and the country of residence the personal tax has already been cited.[14] Nor is it surprising that such a division should be favored by a group of experts most of whom were from debtor nations. Their resolutions contained some derogation from these principles but in the main they followed them. The technical experts had recommended that real estate rentals and mortgage interest should be taxed by the state where the real estate is situated;[15] that earned income (salaries, wages, etc.) should be taxed by the state where the services are performed;[16] that the income from business should be taxed where the business is carried on.[15] Maritime shipping, according to the experts' plan,[15] is to be treated in accordance with the reciprocal proviso of the American Revenue Acts of 1921 and of subsequent years. The experts had also recommended that interest on bonds, deposits and accounts should, as a rule, be taxed only by the debtor country[17] and dividends on stocks likewise.[16] The inadvisability of such a provision especially as regards bond interest, had already been pointed out, because the borrower usually is required to agree that

[14] See p. 48 hereof.
[15] F. 212, p. 31.
[16] Ibid., p. 32.
[17] This phrase is used throughout the reports and during the conferences as being equivalent to the "paying country" and not with reference to the country's international financial standing.

the lender will receive the interest "free of any existing tax or any tax that may be hereafter imposed." [18]

§ 12. Experts' Resolutions Favorable to Debtor States. The American authorities doubtless felt that the reason why no important element of income was assigned to creditor countries for taxation in the experts resolutions was that Great Britain and the Netherlands had been the only important creditor nations taking part in the deliberations up to that time and had been probably overruled by the votes of advisers from debtor states.

§ 13. Classification of Taxes Not in Accordance with American Classification. In the second place it was apparent to the American authorities that the form of convention contemplated presupposed the existence of taxing systems based on impersonal and personal income taxes like the French but which is certainly not the American, British, or Scandinavian classification. In France, for example, the impersonal taxes are collected on 8 schedules of income and at rates of 6 or 12 per cent on private pensions, of 15 per cent on commercial and industrial profits, and of 18 per cent on the income from transferable securities. In addition there is a personal tax on total income at progressive rates from 1.2 per cent to 30 per cent.[19] It followed, therefore, that America could not make a bilateral treaty with any nation whose taxes are based on a system similar to France's without either classifying income rather than taxes or remodeling the American tax system to harmonize with the League's proposed plan.

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[18] That is, imposed by the borrowing country. This clause is often seen in advertisements of underwriting syndicates offering foreign securities for sale.

[19] Commerce Reports, U. S. Dept. of Commerce, Mar. 1, 1926, p. 513, also C. L. 112, November 20, 1925 (mimeographed) pp. 6, 7 (U. S. Dept. of Commerce).

§ 14. **Americans at a Tax Disadvantage in Certain Countries.** In the third place the American authorities realized from a study of certain bilateral conventions already ratified, that citizens of other states trading, investing, or receiving income for services from beyond their national borders were in a more favorable position than Americans similarly trading, investing or rendering services. Furthermore, whatever relief the American receives from double taxation is as a concession from the Treasury of the United States while under the other plans the relief would be based on reciprocity.[20]

§ 15. **Growth of American Foreign Trade and Investments Abroad.** In the fourth place, the constantly growing foreign trade of the United States and the increase in foreign investments by American taxpayers placed upon the government a certain responsibility to take a hand in shaping a uniform policy looking toward the elimination of double taxation to the end that the greatest possible protection might be afforded our position as a creditor nation.

§ 16. **Opposition to the Bilateral Treaty Plan.** In the fifth place the Double Taxation Committee of the United States Chamber of Commerce had more than once opposed the scheme of miscellaneous bilateral conventions and had favored a general convention on specific points. Other American authorities recalled the bargaining that had gone on in connection with the tax treaty with Spain (1902) and in the case of tariff treaties.

§ 17. **Active Participation by United States Desired by Existing Committee.** The sixth reason was perhaps the most compelling of all. It related to the attitude of

[20] So true is this that the Economists' Report considered the American plan as unsatisfactory even as a basis of discussion for the solution of the general problem. See E. F. S. 73, p. 48.

the members of the committee of Technical Experts toward American participation in its labor and the fact that the delegates appointed would speak only as experts and not as treaty-making plenipotentiaries of the United States.[21] It was known that the experts wanted exact information about the American legislative provisions and administrative policies, and that certain American business interests had urged that the vote of America in such a conference should be a formal one and that the American delegate or delegates should not be unofficial observers. All parties were aware that since the United States was the most important commercial country not then represented on the Committee of Technical Experts, the usefulness of the work of that committee would be considerably lessened without American governmental coöperation and advice.

§ 18. The Enlarged Committee of Technical Experts. When the eighth session of the committee met in London in April, 1927, the United States was represented by Dr. Thomas S. Adams, then President of the American Economic Association, Professor at Yale University, Chairman of the Double Taxation Committee of the United States Chamber of Commerce, and formerly Chairman of the Advisory Tax Board (Treasury Department), President of the National Tax Association, and a member of the Federal Tax Simplification Board. He was assisted by Mr. Mitchell B. Carroll, at that time Chief of the Tax Section, Foreign Laws Division, Department of Commerce, and by Miss Annabel Mathews, then an attorney in the Office of the General Counsel, Bureau of Internal Revenue of the Treasury Department. Delegates from twelve other countries were also present.[22]

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[21] C. 216, p. 6.
[22] Ibid., pp. 6, 7.

§ 19. **Its Invited Advisers.** The Council of the League had invited the International Chamber to send a delegation to assist in an advisory capacity the technical experts in their deliberations, and it did so. The League experts also heard members of the Advisory Committee on Communications and Transit explain their views concerning appropriate measures to prevent the double taxation of maritime and inland navigation companies.[23]

§ 20. **The Committee's Accomplishments.** The specific accomplishment of the London meeting was that it drew up and approved four draft conventions and made recommendations concerning work still to be done in the field of double taxation and fiscal evasion. Moreover, it considered, although it did not approve, the alternative Income Tax Draft Convention proposed by Professor Adams.[24]

We have just said that the experts drafted four model conventions. Since we are limiting this study to the double taxation of income, we shall not discuss conventions II, III, and IV, which deal with succession duties, administrative assistance in matters of taxation, and judicial assistance in the collection of taxes. Nor shall we here analyze "the convention for the prevention of double taxation in the sphere of direct impersonal and personal taxes," since it, in its somewhat amended form, is but one of three income tax conventions approved in 1928 in the larger meeting of government experts, and

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[23] Ibid., p. 7.

[24] That plan is printed in full and discussed in Trade Information Bulletin No. 523, published by the United States Department of Commerce in January, 1928, under the title "Double Taxation Relief: Discussion of Conventions drafted at International Conference of Experts, 1927 and other measures" by Mitchell B. Carroll, Chief Tax Section, Commercial Laws Division, with Introduction by Thomas S. Adams, American Member, Committee of Experts."

since in Chapter XI constant reference is made to the London conclusions.

§ 21. **Three of Its Decisions.** Certain decisions reached by the Committee of Technical Experts in London are especially important and have a hearing on subsequent events. These were as follows:

> "In the matter of double taxation in particular, the fiscal systems of the various countries are so fundamentally different that it seems at present practically impossible to draft a collective convention, unless it were worded in such general terms as to be of no practical value." [25]
>
> "Points on which complete understanding could not be arrived at have been left for negotiation and decision to any states when in the future they seek to conclude bilateral treaties. The committee has striven earnestly to restrict to the utmost possible extent the number of questions thus left open." [26]
>
> "The committee refrained from examining in detail several co-related questions of international law, such as the doctrine of reciprocity, the treatment of foreign nations and the principle of the most-favored-nation in their relation to the problem of double taxation. . . . It considers moreover, that the fiscal laws throughout the world will undergo a gradual evolution and that this will, in the future, make it possible to simplify the measures it has recommended and possibly even to unify fiscal legislation."

§ 22. **Its Conclusions as to Future Organization.** The committee concluded its report with recommendations concerning future work. It recommended that a perma-

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[25] C. 216, p. 8.
[26] Ibid., p. 9.

nent organization be created which would give its attention to the problems *inter alia* of drawing up "model rules for the apportionment of taxation applicable to the profits or capital or undertakings working in several countries,"[27] of standardizing the fiscal clauses in commercial treaties, and giving advice when requested to administrations engaged in preparing fiscal reforms. In addition it should make periodic investigations and reports on those matters, it should prepare bilateral and collective convention texts and revise them as need appears. It should be responsible for the publication (1) of memoranda on existing tax systems, (2) of an annual collection of double-taxation treaties,[28] and (3) of an annual report on the progress during the year of the movement to eliminate double taxation.

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[27] Ibid., p. 31.
[28] Ibid., p. 32.

CHAPTER VI

GENERAL DOUBLE TAXATION TREATIES MAKING NO DISTINCTION BETWEEN PERSONAL AND IMPERSONAL TAXES

§ 1. Introduction.
§ 2. Attempt to Draft a General Convention.
§ 3. What Such a General Convention Would Have Included.
§ 4. Statement of Purpose.
§ 5. Applicability of Treaty.
§ 6. General Rules of Tax Liability.
§ 7. Immovable Property and the Income Therefrom.
§ 8. Business Enterprises and Income Therefrom.
§ 9. Income from Liberal Professions.
§ 10. Compensation for Public Services.
§ 11. Diplomatic and Consular Service.
§ 12. Customs and Railway Administrations.
§ 13. Directors' Fees.
§ 14. Mortgages and Interest Thereon.
§ 15. Other Income from Capital.
§ 16. Legal Persons.
§ 17. Danube Shipping.
§ 18. Maritime Shipping and Air Navigation.
§ 19. Estates in Process of Settlement.
§ 20. Life Annuities and Other Income.
§ 21. Special Economic and Commercial Agreements.
§ 22. Special Arrangements.
§ 23. Special Czechoslovak Problems.
§ 24. Changes in Taxpayers' Personal Circumstances.
§ 25. Fiscal Treatment of Foreigners.
§ 26. Mutual Assistance for Recovery of Taxes.
§ 27. Mutual Administrative Assistance.
§ 28. Ratification and Denunciation of Treaty.
§ 29. Conclusions.
§ 30. An Explanation.
§ 31. The French-Saar Agreement.
§ 32. The Danish-Icelandic Agreement.
§ 33. The British-Irish Accord.

§ 1. **Introduction.** There are thirteen General Double Taxation treaties now in force[1] which make no distinction between personal and impersonal taxes. Three of these have a style and content quite different from the other ten and are considered on pages 99–101 at the end of this chapter. These three are those between France and the Saar, signed July 5, 1922, between Great Britain and the Irish Free State (contained in the British Finance Act of April 14, 1926), and between Denmark and Iceland, approved August 11, 1927. A list of the other ten follows:

Between	*Signed*	*At*	*In*
Germany–Czechoslovakia	December 31, 1921	Prague	(German (Czech
Austria–Czechoslovakia	February 18, 1922	Vienna	(German (Czech
Germany–Austria	May 23, 1922	Berlin	(German
Hungary–Czechoslovakia	July 13, 1923	Prague	(French
Germany–Hungary	November 6, 1923	Berlin	(Hungarian (German
Danzig-Poland	March 17, 1924	Danzig	(German (Polish
Austria–Hungary	November 8, 1924	Vienna	(German (Hungarian
Poland–Czechoslovakia	April 23, 1925	Warsaw	(Polish (Czech
Austria–Switzerland	October 24, 1927	Vienna	(German
Germany–Sweden	April 25, 1928	Berlin	(German (Swedish

§ 2. **Attempt to Draft a General Convention.** On a first reading of these ten one is impressed by their similarity of form, subject matter, and treatment of classes of income. In fact, one naturally wonders whether the drafting of a general convention by the eight powers,

[1] C. 345, pp. 9–72.

parties to the ten bilateral agreements, would not be an easy matter. In fact many tax experts have supposed such a treaty to be practical. The outstanding argument in favor of such a general convention is that it would save the interested Finance Ministries from the complications incident to following different rules with regard to income received by taxpayers of countries A, B, C, or D, where different proration, nationality, residence, or origin rules would otherwise apply.

The present writer proposes to examine the ten treaties referred to above in order to ascertain whether a general treaty could not be substituted for them.

§ 3. What Such a General Convention Would Have Included. The results are set forth in the text printed in capital letters below. After each article of the resultant treaty are notes showing the extent to which the principles therein set forth are to be found in the treaties studied.

§ 4. Statement of Purpose.

PREAMBLE

THE CONTRACTING STATES, BEING DESIROUS OF PREVENTING DOUBLE TAXATION, IN THE SPHERE OF DIRECT TAXES, HAVE CONCLUDED THE FOLLOWING TREATY.

This would omit reference to the laying down of "rules for mutual legal and administrative assistance relating to taxation"[2] included in the Czech agreements with Hungary and Austria. Mention is made, however, of these items in Articles XXII and XXIII of this draft. The Austro-Swiss statement reads "being desirous of

[2] Ibid., pp. 21 and 30.

preventing double taxation in certain cases."[3] Austria, Germany and Hungary in their treaties with each other use the phrase "desirous of ensuring the equal adjustment (distribution) of taxes at home and abroad in the field of direct taxation,"[4] while the German-Swedish agreement adds "to conclude an agreement concerning the allocation of the right of taxation as between the states in respect of various sources of income."[5]

§ 5. Applicability of Treaty.

ARTICLE I

THE PRESENT TREATY SHALL APPLY TO THE FOLLOWING TAXES LEVIABLE ON AND AFTER (DATE) UNDER THE LAWS OF

AUSTRIA — CZECHOSLOVAKIA — DANZIG — GERMANY — HUNGARY — POLAND — SWEDEN — SWITZERLAND.

Hereunder it would be necessary to list the particular classes of taxes to be envisaged by the treaty. The countries[6] named are those which have already entered into general double taxation treaties which distinguish between personal and impersonal taxes.

§ 6. General Rules of Tax Liability.

ARTICLE II

A. EXCEPT AS OTHERWISE PROVIDED IN THE FOLLOWING ARTICLES, A NATIONAL OF ANY OF THE CONTRACTING STATES SHALL BE CALLED UPON TO PAY DIRECT TAXES ONLY IN THE STATES IN WHICH HE IS DOMICILED, OR FAILING SUCH DOMICILE, IN THE STATE IN WHICH HE IS NORMALLY RESIDENT.

B. AN INDIVIDUAL HAVING A DOMICILE IN MORE THAN ONE OF THE STATES OF THE HIGH CONTRACTING

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[3] Ibid., p. 61.
[4] Ibid., pp. 15, 36, 46.
[5] Ibid., p. 64.
[6] Danzig is, of course, only a free city.

PARTIES SHALL BE CALLED UPON TO PAY DIRECT TAXES ONLY IN THE STATE OF WHICH HE IS A NATIONAL.

C. AS REGARDS INDIVIDUALS WHO ARE NATIONALS OF MORE THAN ONE OF THESE STATES OR OF NONE OF THE STATES CONCERNED, OR OF ONE OF THE STATES CONCERNED AND OF ANOTHER NOT A PARTY TO THIS AGREEMENT, SPECIAL ARRANGEMENTS SHALL BE MADE.

D. A DOMICILE WITHIN THE MEANING OF THIS TREATY SHALL EXIST IN CASES IN WHICH ANY PERSON POSSESSES A DWELLING UNDER CIRCUMSTANCES WHICH GIVE GOOD GROUNDS FOR ASSUMING THAT HE INTENDS TO RETAIN THE SAME.

E. RESIDENCE WITHIN THE MEANING OF THIS TREATY SHALL EXIST IN CASES IN WHICH A PERSON HAS A RESIDENCE UNDER CIRCUMSTANCES WHICH GIVE GOOD GROUNDS FOR ASSUMING THAT HE IS NOT MERELY PASSING THROUGH THE PLACE OR COUNTRY IN QUESTION.

The German-Austrian [7] and Austro-Swiss [8] treaties provide derogations for the prorating of the tax between the states involved if a national of one of them changes his residence during the taxable year. On the other hand the Austro-Czechoslovak treaty states a different rule in the following language: [9]

> "In all cases where a taxpayer has a domicile in each of the two states, only the domicile in the state of which the taxpayer is a national shall be recognized, *unless his residence in the other state during the period on which the assessment of the tax is based was very much longer; in the latter case he shall be regarded as domiciled in the other state.*"

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[7] C. 345, p. 15.
[8] Ibid., p. 63 (final protocol).
[9] Ibid., p. 21.

§ 7. Immovable Property and the Income Therefrom.

ARTICLE III

LANDED ESTATES AND BUILDINGS, AND THE INCOME DERIVED THEREFROM, SHALL ONLY BE SUBJECT TO DIRECT TAXATION IN THE STATE IN WHICH THEY ARE SITUATED.

So provides the German-Czech treaty which adds, however, a second paragraph,[10] found also in the Austro-German [11] and Danzig-Polish [12] agreements:

> "The provisions of the preceding paragraph shall not apply to mortgages and income derived therefrom, which shall be regarded as capital and income therefrom."

A special emphasis on this question of mortgages is found in the Polish-Czech treaty which is referred to under Article X.

The Austro-Swiss convention,[13] which is in agreement with the text in capital letters above given, fails to mention specifically mortgages and the interest thereon. Czechoslovakia's agreements with Austria [14] and Hungary [15] and those between Hungary and Germany [16] and Austria [17] on this subject read, with minor variations of phraseology:

> "Real estate, buildings, and mortgages, and the income derived therefrom shall be subject to direct taxation only in the state in which the property is situated."

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[10] Ibid., p. 10.
[11] Ibid., p. 16.
[12] Par. (2) of Art. II of the Danzig-Polish Agreement expresses the same idea but in different words. See Ibid., p. 4.
[13] Ibid., p. 62.
[14] Ibid., p. 10.
[15] Ibid., p. 30.
[16] Ibid., p. 36.
[17] Ibid., p. 69.

The final protocol to the Swedish-German agreement provides,[18] on the contrary, that "each of the two states shall act in accordance with its own legislation in regard to income derived from claims secured on mortgages."

§ 8. Business Enterprises and Income Therefrom.

ARTICLE IV

(1) INDUSTRIAL UNDERTAKINGS (THE EXPLOITATION OF A PRODUCTIVE UNDERTAKING OR THE EXERCISE OF A LUCRATIVE PROFESSION) AND THE INCOME DERIVED THEREFROM SHALL BE SUBJECT TO DIRECT TAXATION ONLY IN THE STATE IN WHICH A BUSINESS ESTABLISHMENT FOR CARRYING ON THE UNDERTAKING IS MAINTAINED.

(2) THE TERM "BUSINESS ESTABLISHMENT" SHALL INCLUDE: THE MANAGER'S OFFICES, BRANCH ESTABLISHMENTS, WORKSHOPS, OFFICES WHERE PURCHASES OR SALES ARE EFFECTED, DEPOTS, BRANCHES AND ALL OTHER ESTABLISHMENTS MAINTAINED FOR THE PURPOSE OF THE CARRYING ON OF THE INDUSTRY BY THE OWNER HIMSELF OR HIS PARTNERS, RESPONSIBLE AGENTS OR OTHER PERMANENT REPRESENTATIVES.

(3) IF AN INDUSTRIAL OR COMMERCIAL ENTERPRISE POSSESSES BUSINESS ESTABLISHMENTS IN BOTH STATES, DIRECT TAXES SHALL BE LEVIED IN EACH STATE ONLY IN PROPORTION TO THE AMOUNT OF BUSINESS TRANSACTED IN THE ESTABLISHMENTS SITUATED IN THAT STATE. THE FINANCE MINISTERS OF THE TWO STATES SHALL COME TO AN AGREEMENT REGARDING AN EQUITABLE APPORTIONMENT OF THE INCOME OR PROFITS DERIVED FROM SUCH UNDERTAKINGS.

(4) PARTNERSHIPS IN UNDERTAKINGS ESTABLISHED IN THE FORM OF COMPANIES (WITH THE EXCEPTION OF MINING SHARES (KUXEN), SHARES, FOUNDERS' SHARES AND OTHER SECURITIES) SHALL BE REGARDED AS LUCRATIVE UNDERTAKINGS.

(5) THE FOREGOING PROVISIONS SHALL NOT APPLY TO TAXES ON HAWKING AND OTHER ITINERANT TRADES.

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[18] Ibid., p. 69.

The five paragraphs of this Article are taken word for word from the German-Austrian Treaty.[19] Without change in any important part this text is that found in the other treaties which Germany has with Czechoslovakia, Hungary and Sweden, in those between Austria and Hungary, Austria and Czechoslovakia, and Czechoslovakia and Hungary.

In the convention between Poland and Czechoslovakia[20] there appear three paragraphs dealing with this subject. One states that the term "working establishment" shall not include the following: "journeys made by the head of the undertakings to obtain orders, delivery of orders, delivery of goods on commission to an established dealer, delivery to customers of goods transported from one country to the other or of goods lying in warehouses belonging to a transport undertaking or to a forwarding agent, provided that such transactions are not carried out by officers or employees of the undertaking."

The other two prescribe the rules for apportionment in the following terms:

> "The common receipts of such establishments shall, as a general rule, be allocated in proportion to the funds and capital allotted to those establishments, and the common expenditure shall be allocated in proportion to the receipts. In certain cases the Finance Ministers of the two states may agree upon a different system of allocation.
>
> "Receipts obtained in one country from the sale of goods purchased in the other country, and the expenditures corresponding to such receipts, shall as a general rule be divided equally among the establishments concerned in the transaction."

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[19] Ibid., p. 16.
[20] Ibid., p. 53.

The Austro-Swiss agreement condenses its provisions concerning the taxation of business undertakings into two paragraphs of which the second is the following definition of the term "business establishments" (*Betriebsstätte*) found in the first:[21]

> "Commercial and industrial enterprises whose owners have their domicile (seat) in one of the two states and who extend their activity to the territory of the other state, shall not be subject in this latter state to income tax, or tax on capital, or tax on professional profits, or to corporation tax."

The Danzig-Polish agreement[22] makes detailed provisions for the determination of liability to tax on business, the actual text containing thirteen paragraphs, with two of them divided into subparagraphs and one of those into three further sections.

§ 9. Income from Liberal Professions.

ARTICLE V

IN THE CASE OF INCOME DERIVED FROM THE PRACTICE OF SCIENCE, ART OR LETTERS, TEACHING OR EDUCATION, OR FROM THE EXERCISE OF THE PROFESSIONS OF PHYSICIAN, LAWYER, ARCHITECT OR ENGINEER, OR OF ANY OTHER LIBERAL PROFESSION THE PROVISIONS OF ARTICLE IV SHALL ONLY APPLY IN SO FAR AS THE PERMANENT HEADQUARTERS OF THE PROFESSIONAL ACTIVITY (OFFICE, CONSULTING ROOM, ETC.) ARE SITUATED IN THE OTHER STATE.

While most of the treaties in this group include within the scope of Article IV the taxation of "*lucrative* professions" it is important to note that all except the

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[21] Ibid., p. 62. In this Document the word "act" (Article V, Par. (1), line 2) should be "not." See the French text from which the author has made the foregoing English translation.

[22] Ibid., pp. 41–42.

Austro-Swiss [23] and Polish-Czech [24] conventions have a separate article dealing with *liberal* professions, after the manner of the provision in capital letters.

This article with but slight variation is found in the German-Czech, German-Austrian, Danzig-Polish, German-Hungarian and Austro-Hungarian conventions.

The Czech-Hungarian treaty [25] uses, instead of the words "permanent headquarters (office, consulting room, etc.)" the expression "a permanent business center." The Danzig-Polish treaty [26] instead of listing sources of income as from "science, art or letters, teaching or education" speaks of "other gainful occupations, and in particular" of scientific, artistic, literary, teaching or educational activities." The German-Swedish agreement [27] mentions "activities from a fixed center of that state." The Austro-Czech treaty says [28] that the provisions referred to "shall only apply in so far as the exercise of the profession involves an established center (business establishment) in the other country."

§ 10. Compensation for Public Services.

ARTICLE VI

ALL COMPENSATION PAID AT REGULAR INTERVALS FOR PUBLIC SERVICES PAST AND PRESENT WHETHER RENDERED TO A CENTRAL GOVERNMENT OR ONE OF ITS CONSTITUENT STATES OR PROVINCES, OR ANY POLITICAL SUBDIVISION THEREOF (MUNICIPALITY, COMMUNITY, ETC.) SHALL BE TAXABLE ONLY IN THE DEBTOR STATE.

Many of the treaties use the phrase "shall only be subject to direct taxation in the country in which the

[23] Ibid., pp. 61–64.
[24] Ibid., pp. 52–55.
[25] Ibid., p. 31.
[26] Ibid., p. 43.
[27] Ibid., p. 65.
[28] Ibid., p. 22.

payment is effected''; [29] and then in the Polish-Czech protocol [30] there follows an explanation that the place of effecting payment means where the governmental political subdivision referred to is situated.

The treaties between Germany and Sweden, Danzig and Poland, and Poland and Czechoslovakia omit the requirement that the payments must be at regular or fixed intervals, while the Austro-Swiss convention provides an absolutely different basis. It provides for no distinction to be made in the taxation of earned income whether from public or private sources. The wording of that provision is as follows: [31]

> ''Income earned by persons employed in the public services or in the service of private persons and derived from such employment, under whatever designation or in whatever form (earned income), shall only be liable to income tax in the state in which the taxpayer is domiciled. Half-pay, pensions on retirement, widows' and orphans' pensions and other emoluments or allowances granted for services rendered or earned in a profession in which the person concerned was formerly engaged, shall be regarded as earned income.''

The word ''compensation'' as used in the suggested text is variously defined but a typical definition is that in the agreement between Czechoslovakia and Hungary: [32] ''salaries, retired pay, maintenance allowances, pensions and the like.''

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[29] Ibid., pp. 10, 17, 22, 31, 37, 47, 53.
[30] Ibid., p. 56.
[31] Ibid., p. 62.
[32] Ibid., p. 31.

§ 11. Diplomatic and Consular Service.

ARTICLE VII

THE DIPLOMATIC, CONSULAR AND OTHER REPRESENTATIVES OF THE CONTRACTING STATES, PROVIDED THAT THEY ARE OFFICIALS BY PROFESSION, TOGETHER WITH OFFICIALS ATTACHED TO THEM AND PERSONS IN THEIR SERVICE OR IN THE SERVICE OF THEIR OFFICIALS, SHALL BE EXEMPT FROM DIRECT TAXATION IN THE COUNTRY TO WHICH THEY ARE ACCREDITED. SUCH EXEMPTION SHALL ONLY APPLY IN SO FAR AS THE AFORESAID PERSONS ARE NATIONALS OF THE COUNTRY WHICH THEY REPRESENT AND DO NOT ENGAGE IN ANY LUCRATIVE OCCUPATION OUTSIDE THEIR OFFICIAL DUTIES IN THE STATES TO WHICH THEY ARE ACCREDITED. EXEMPTION DOES NOT APPLY TO TAXES TO BE LEVIED IN ACCORDANCE WITH ARTICLES III AND IV OR TO BE DEDUCTED AT THE SOURCE AS SPECIFIED IN ARTICLE XI.

The above is quoted verbatim from Germany's treaty with Austria,[33] except for changes in the number of the Articles therein referred to, and the substitution of the word "contracting" for the word "two."

Far more elaborate provisions are found in the Danzig-Polish treaty,[34] but they do not relate exclusively to "officials by profession" and their aides and their servants. Furthermore, the introduction of "their business and private domicile" is a new factor, and the provisions in the second paragraph below cited from that convention are entirely at variance with the plan outlined in the six other treaties referred to above:

> "Officials, employees, servants, workers, etc., of one of the Contracting Parties or of an undertaking operated by such Party, who have their

[33] Ibid., p. 18. Similar expressions are to be found in other bilateral treaties between Germany, Hungary, Czechoslovakia, and Austria.

[34] Ibid., p. 72.

business and private domicile on the territory of the one Party, but are nationals of the other Contracting Party, shall nevertheless be liable to direct taxation of their wages or salaries only in the territory in which they have their business and private domicile.

"The foregoing provisions shall not apply to officials, employees, servants, workers, etc., whose household, consisting of spouse and relatives in the ascending and descending line, is in the territory of the other Party. Such officials, employees, servants, workers, etc., are taxable in the territory in which they have their household. In the territory in which their business domicile is situated they shall not be liable to any other taxes imposed in lieu of the wages or income tax, or, in particular, to any strangers' or sojourn tax levied by non-state autonomous associations. The Senate of the Free City of Danzig and the Government of the Republic of Poland shall, after the coming into force of the present Agreement, furnish each other with lists of such individual officials, employees, servants, workers, etc., and shall keep each other informed regarding any change which may occur."

The Polish-Czech and Austro-Swiss conventions omit all reference to the taxation of diplomatic and consular officials. The omission in the latter case is easily explained because the treaty was entered into by the Swiss Confederation on behalf of only one of its cantons, to which the Austrian Government regularly sends neither diplomats nor consuls.

The German-Swedish treaty employs the terms found in the majority of the other treaties but adds a paragraph which does not exist in subject matter or form in any

other bilateral tax treaty here studied. It reads as follows:[35]

> "The provisions of the present Agreement shall apply to honorary consuls (*consules electi*) who are nationals only of the state which appoints them, in so far as these consuls are not liable to direct taxation in the state to which they are sent in respect of the official emoluments they receive as consuls."

§ 12. Customs and Railway Administrations.

ARTICLE VIII

THE PROVISIONS OF ARTICLE VII SHALL APPLY IN LIKE MANNER TO PERSONS IN THE SERVICE OF THE CUSTOMS AND RAILWAY ADMINISTRATIONS OF ONE OF THE HIGH CONTRACTING PARTIES WHO ARE EMPLOYED BY THESE ADMINISTRATORS ON OFFICIAL BUSINESS IN A PLACE SITUATED IN THE TERRITORY OF THE OTHER STATE AND WHO ONLY RESIDE THERE FOR THAT REASON, AND TO THE PERSONS AND SERVANTS LIVING WITH THEM IN THE SAME HOUSEHOLD, PROVIDED THAT THE PERSONS MENTIONED ABOVE ARE NATIONALS OF THE COUNTRY WHICH EMPLOYS THEM.

The above is taken from the Czecho-Hungarian treaty.[36] A similar provision is contained in the Czecho-German treaty.

The Austro-Czech provision on this subject adds the words "or of the provinces thereof," extending thereby the article to other customs and railway service officials and employees than those of the central government of one of the contracting states.[37] Two other treaties specifically so provide.[38]

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[35] Ibid., p. 67.
[36] Ibid., p. 33, "Article VII" being substituted for Article 11.
[37] Ibid., p. 24.
[38] Ibid., pp. 19 and 48.

The Austro-Swiss arrangement[39] omits the requirement of nationality, limits the rule to the Customs staff at the railway stations of Buchs and St. Margarethen, and confirms an old agreement (Aug. 2, 1872) to the effect that the salaries of persons in the Austrian or Swiss customs administration "employed at an office of that administration which is situated in the territory of the other state and who, on this account, are domiciled there, shall only be subject to tax in their own country." This agreement would deserve to be listed among the pre-war tax treaties but for the fact that its main concern was not the "prevention of double taxation"; that was merely one of the items to which it related.

The German-Hungarian convention does not mention this subject.[40] Reference has already been made, in discussing the previous article, to the Danzig-Polish arrangement with regard to governmental representatives. The treaty between Czechoslovakia and Poland does not specifically mention customs or railway employees.

§ 13. Directors' Fees.

ARTICLE IX

THE SPECIAL TAX ON THE PERCENTAGE PAID TO THE MEMBERS OF BOARDS OF DIRECTORS OF LIMITED LIABILITY COMPANIES AND JOINT STOCK COMPANIES SHALL BE LEVIED IN THE COUNTRY IN WHICH THE UNDERTAKING PAYING THE PERCENTAGE IS ESTABLISHED.

This wording is taken verbatim from the Austro-Czech agreement.[41] The Hungarian treaties with Czechoslovakia and with Germany do not call this tax a *special* one.

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[39] Ibid., p. 62.

[40] Naturally the German-Swedish agreement does not mention this subject since the contracting countries are not contiguous.

[41] C. 345, p. 23.

The German-Hungarian treaty says:[42]

> "The tax on directors' fees shall be levied in the state in which the head office or the center of management and control of the undertaking which pays such fees is established."

Therein is introduced the additional factor of the essential reconciling of "head office" with "center of management and control."

The Austro-Hungarian convention[43] also deals with this matter, but it is the only other one to do so.

§ 14. Mortgages and Interest Thereon.

ARTICLE X

MORTGAGES, TRUSTS, OR LIENS OF ANY SORT SECURED ON LANDED PROPERTY WITHIN THE TERRITORY OF ONE OF THE CONTRACTING STATES, TOGETHER WITH THE INCOME THEREFROM, SHALL ONLY BE SUBJECT TO DIRECT TAXATION BY THE STATE IN WHOSE TERRITORY SUCH PROPERTY IS SITUATED.

The substance of this wording is found in the Polish-Czech treaty[44] which alone among the ten here considered contains a separate article for this subject. The principle is, however, found in many of the other treaties, concerning which the reader is referred to Article III hereof. It differs entirely from the German-Swedish agreement on this point, as has also been pointed out in the comments on Article III.

§ 15. Other Income from Capital.

ARTICLE XI

A. IN ALL CASES IN WHICH THE NATIONAL LAWS OF THE CONTRACTING STATES REGARDING THE TAX ON INCOME PROVIDE THAT THE INTEREST, DIVIDEND, OR INCOME FROM CAPITAL SHALL BE DEDUCTED AT

[42] Ibid., p. 37.
[43] Ibid., p. 47.
[44] Ibid., p. 53.

THE SOURCE, THE TAX THEREON SHALL BE LEVIED ONLY BY THE STATE IN WHOSE TERRITORY THE DEDUCTION AT THE SOURCE IS TO BE EFFECTED IN ACCORDANCE WITH ITS LAWS.

B. IF A MAIN ESTABLISHMENT IS SITUATED IN ONE COUNTRY AND A BRANCH ESTABLISHMENT IN THE OTHER, THE TAX ON THE INTEREST ACCRUING FROM THE BUSINESS TRANSACTED BY THE BRANCH ESTABLISHMENT SHALL BE DEDUCED ONLY FOR THE BENEFIT OF THE STATE IN WHICH THE BRANCH IS SITUATED.

The Austro-Hungarian treaty [45] more elaborately defines the subject matter of this article by including income from public (Federal, State, Municipal) securities, corporation bond interest, savings bank deposit interest, income on corporation vouchers, or interest-bearing certificates of deposits made with credit institutions or banks.

The German-Swedish provision on this matter is simply stated, reading thus: [46]

> "Income derived from movable funded property shall only be taxable in the state in which the taxpayer has his domicile.
>
> "Where the tax on income accruing within the country from capital is collected in either of the two states by means of deductions (at the source), the right to make such fiscal deductions shall not be affected by the provisions of paragraph (1)."

The statement in the Danzig-Polish agreement is likewise brief and to the point: [47]

> "Where, according to the laws of the Contracting Parties, taxes on capital and income from capital are collected by means of deductions (at the source), these taxes shall be collected without

[45] Ibid., p. 47.
[46] Ibid., p. 66.
[47] Ibid., p. 47.

restriction; the other Contracting Party shall not, however, collect similar taxes due, according to its laws, in respect to the same sources of income."

On the other hand the Polish-Czech treaty does little to prevent double taxation in this matter since it reads as follows:[48]

"Each of the contracting parties reserves the unrestricted right to tax capital and the interest thereon, provided always that such taxes shall be deducted at the source, or collected from a person other than the taxpayer. This reservation shall, however, in no way invalidate the right of the other state to tax such capital and income in accordance with the laws in force in its territory."

The protocol adds that these provisions "shall apply to schedular tax only and not to income tax"[49] (using *income tax* in the sense of personal tax on total income).

§ 16. Legal Persons.

ARTICLE XII

A. THE PROVISIONS OF ARTICLE III AND OF PARAGRAPHS 1 TO 4 OF ARTICLE IV SHALL ALSO APPLY TO LEGAL PERSONS.

B. IN THE CASE OF SUCH PERSONS THE HEAD OFFICE, OR IN THE ABSENCE OF SUCH OFFICE, THE CENTER OF MANAGEMENT AND CONTROL, SHALL BE CONSIDERED AS THE PLACE OF DOMICILE.

C. NOTHING IN PARAGRAPH A OF THE ARTICLE SHALL PREVENT LEGAL PERSONS FROM BEING SUBJECT TO A SPECIAL TAX ON PROFITS IMPOSED ON THE INCOME DERIVED FROM THEIR REAL ESTATE AND FROM INTEREST ON MORTGAGES.

In the group of treaties studied there is the usual variation as to the definition of the domicile of legal persons.

[48] Ibid., p. 53.
[49] Ibid., p. 56.

"The seat of such juridical persons," [50] "where their head offices are situated, and if they have no head offices, in the places where their centers of management and control are situated," [51] and "the head office or the center of management and control" [52] are terms used.

The Austro-Hungarian agreement adds "profits on investments taxable by deduction at the source" [53] to the provisions of paragraph C.

No mention of these matters appearing in the Austro-Swiss treaty, the omission was remedied by the insertion of the following paragraph in the Protocol: [54]

> "The treatment accorded to commercial and industrial undertakings shall also be applied to participations in undertakings formed on a company basis (in particular, to partnerships in private firms and shares in limited liability companies), with the exception of mining shares, founders' shares and other securities."

In the Polish-Czech agreement there is an extension of the provisions concerning legal persons to those sections of the treaty dealing with frontier adjustments and related items.

§ 17. Danube Shipping.

ARTICLE XIII

(1) SHIPPING UNDERTAKINGS ON THE DANUBE SHALL NOT BE LIABLE TO TAXES ON PROFITS ARISING OUT OF THEIR SHIPPING BUSINESS EXCEPT IN THE STATE IN WHICH THE HEAD OFFICE OF THE UNDERTAKING IS SITUATED.

(2) SHIPPING UNDERTAKINGS, FOR THE PURPOSES OF THE PRECEDING PARAGRAPH, SHALL BE HELD TO

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[50] Ibid., p. 43.
[51] Ibid., p. 32.
[52] Ibid., p. 37.
[53] Ibid., p. 47.
[54] Ibid., p. 54.

INCLUDE BUSINESS OPERATIONS DIRECTLY CONNECTED WITH THE TRANSPORT OF PERSONS AND GOODS AND THE UPKEEP OF THE NECESSARY INSTALLATIONS IN THE PLACES AT WHICH THE VESSELS CALL (OFFICES AT WHICH FREIGHT CONTRACTS MAY BE CONCLUDED, INSTALLATIONS FOR LOADING CARGO, ETC.).

Hungary's treaty with Austria [55] contains the foregoing provision. More abbreviated statements to the same effect are found in her conventions with Germany [56] and Czechoslovakia.[57]

§ 18. Maritime Shipping and Air Navigation.

ARTICLE XIV

INCOME DERIVED FROM THE OPERATIONS OF MARITIME SHIPPING AND AIR NAVIGATION CONCERNS SHALL BE TAXABLE ONLY IN THE STATE IN WHICH THE CENTER OF MANAGEMENT OF THE UNDERTAKING IS SITUATED.

This provision is found only in the German-Swedish agreement,[58] the most recently ratified international double taxation convention of those studied in this chapter.

§ 19. Estates in Process of Settlement.

ARTICLE XV

LEGACIES IN ABEYANCE, OR LEGACIES IN RESPECT OF WHICH THE HEIRS HAVE NOT YET BEEN DETERMINED, SHALL BE TREATED FOR FISCAL PURPOSES AS IF THE DECEASED WERE STILL ALIVE.

This is the wording found in the Danzig-Polish agreement.[59] Similar provisions are contained in several other

[55] Ibid., p. 48.
[56] Ibid., p. 38.
[57] Ibid., p. 33.
[58] Ibid., p. 65.
[59] Ibid., p. 41.

treaties or the protocols thereto. For example, that between Czechoslovakia and Hungary says:[60]

> "Estates in regard to which probate has not yet been granted shall be treated as if the testator or devisor were still alive."

In Germany's arrangements with Czechoslovakia[61] and Austria[61] the statement is in greater detail:

> "The provisions of the Austrian (Czechoslovak) laws on the taxation of inherited property the title to which has not been established shall not apply if the income or capital accruing to the heir from such inherited property is directly subject to taxation in Germany under the provisions of the present treaty.
>
> "Taxation levied on inherited property the title of which has not been established shall be repaid as soon as the conditions referred to in paragraph 1 are proved to exist and the heir applies for repayment."

No provision similar to the quoted texts exists in the other treaties.

§ 20. Life Annuities and Other Income.

ARTICLE XVI

ANY OTHER FORM OF INCOME NOT SPECIFIED IN THE PRECEDING ARTICLES, INCLUDING LIFE ANNUITIES, SHALL BE TAXABLE ONLY IN THE STATE IN WHICH THE TAXPAYER HAS HIS DOMICILE.

This provision is quoted from Germany's agreement with Sweden.[62] It appears in this form in no other treaty but it is contemplated by all the Contracting Parties by virtue of the force of Article II.

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[60] Ibid., p. 33.
[61] Ibid., pp. 13 and 18.
[62] Ibid., p. 66.

§ 21. Special Economic and Commercial Agreements.

ARTICLE XVII

NOTHING IN THIS TREATY SHALL INVALIDATE ANY OF THE FISCAL PROVISIONS CONTAINED IN THE COMMERCIAL AGREEMENTS BETWEEN AUSTRIA AND CZECHOSLOVAKIA: IN THE ECONOMIC AGREEMENT OF JUNE 29, 1920, BETWEEN GERMANY AND CZECHOSLOVAKIA, IN SECTION I PARAGRAPH 3 OF THE INTERIM AGREEMENT OF JUNE 1, 1920, BETWEEN HUNGARY AND GERMANY, AND IN ARTICLES 6 AND 24 OF THE AUSTRO-GERMAN ECONOMIC AGREEMENT OF SEPTEMBER 1, 1920.

These four economic agreements are the only ones so noted in the ten conventions here being studied.

§ 22. Special Arrangements.

ARTICLE XVIII

SPECIAL ARRANGEMENTS SHALL BE MADE BY THE COMPETENT AUTHORITIES OF THE GOVERNMENTS, PARTIES TO THIS TREATY, CONCERNING THE PREVENTION OF DOUBLE TAXATION IN THE CASE OF CERTAIN DIRECT TAXES ON INCOME OR CAPITAL, HOWEVER DESIGNATED, NOT SPECIFICALLY PROVIDED FOR IN THE PRECEDING SECTIONS OF THIS TREATY.

Such taxes include many whose existence is not general and whose comparative burdens and scope may or may not be substantially identical. In nearly all the bilateral treaties studied in this chapter references are found to such special taxes as the tax on capital increments,[63] capital levy,[64] emergency contribution,[65] the tax on excess yield,[66] tax on the redemption of property [67] and the tax on the redemption of capital.[68] To record in one treaty

[63] Ibid., p. 54.
[64] Ibid., p. 12.
[65] Ibid., p. 39.
[66] Ibid., p. 17.
[67] Ibid., p. 39.
[68] Ibid., p. 34.

all the special rules which relate to these taxes and others of a temporary nature and which in most cases are applicable to only two or three countries and in no cases to all countries would be useless, although actually possible.

Noteworthy variations in the application of miscellaneous provisions relative to these taxes exist, as, for example, in the German-Swedish agreement,[69] that most capital taxes shall only be leviable by the state in which the taxpayer is resident, while in the convention between Germany and Austria[70] it is required that the state of which the taxpayer is a national shall alone have the right to levy the tax on capital.

> "If in certain particular cases there is doubt as to the application or interpretation of this convention or it is impossible, notwithstanding the convention, to prevent double taxation, the Finance Ministers of the Contracting Parties shall agree upon the most equitable method of dealing with such cases."

So provides the Polish-Czech treaty.[71] To the same effect is the Austro-Hungarian treaty whose negotiators realized the difficulties likely to arise in the special matter of the "Redemption of Capital" tax or on account of double domicile. In the same way the Finance Ministers of Czechoslovakia and Hungary were authorized in the convention between those states to conclude agreements with a view to modifying or amplifying the provisions of the treaty, especially those relating to "cases which might arise in respect of the capital levy (the tax known as Redemption of Capital) on account of the difference between the decisive dates fixed."[72]

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[69] Ibid., p. 66.
[70] Ibid., p. 16.
[71] Ibid., p. 55.
[72] Ibid., p. 33.

The Danzig-Polish agreement authorizes (in such cases as outlined) "the supreme financial administrative authorities of the two contracting parties" to "conclude special arrangements when circumstances so require." [73]

The German-Swedish treaty says that the taxpayer must first prove "that the measures taken by the financial authorities of the contracting states have resulted in his being subjected to double taxation" and then "he may appeal to the state of which he is a national. If his objection is deemed to be warranted, the supreme financial authorities of the state in question may concert measures with the supreme financial authorities of the other state with a view to equitably avoiding double taxation." [74] Who is to settle the question as to whether he has proved his case is not stated.

The Danzig-Polish requirement on this point reads: [75]

> "Legally valid tax assessments may, in principle only be rectified in accordance with the provisions of the present agreement where the amount of the taxes in question is considerable and calculated seriously to affect the general economic position of the taxpayer. An application for rectification must be made by the taxpayer; this must be submitted to the competent fiscal authorities prior to the expiry of the calendar year subsequent to the entry into force of the present agreement. Taxes already collected shall be refunded in accordance with the regulations of the party which is responsible for making the refund."

On the other hand the Austro-Czech convention [76] authorizes the Finance Ministers "to settle between

[73] Ibid., p. 43.
[74] Ibid., p. 67.
[75] Ibid., p. 44.
[76] Ibid., p. 24.

themselves" the procedure to be adopted and the agreements to be concluded for the prevention of double taxation "whether the present treaty makes provision for the settlement of such cases or not."

Two other conventions contain provisions on the subject of this Article.

§ 23. Special Czechoslovak Problems.

ARTICLE XIX

SPECIAL ARRANGEMENTS SHALL BE MADE BY THE FINANCE MINISTER OF CZECHOSLOVAKIA WITH THE FINANCE MINISTERS OF AUSTRIA, GERMANY, AND POLAND CONCERNING THE APPLICATION OF THIS TREATY TO INHABITANTS OF TERRITORY TRANSFERRED TO THE CZECHOSLOVAK REPUBLIC BY VIRTUE OF THE TREATY OF ST. GERMAIN OR CEDED TO THE CZECHOSLOVAK REPUBLIC IN ACCORDANCE WITH THE DECISION OF THE POLISH-CZECHOSLOVAK FRONTIER DELIMITATION COMMISSION ON APRIL 29, 1924.

Some such article is preferable to an enumeration in the treaty of all the exceptions to be noted to an otherwise general rule. Only one country, moreover, is interested with three others in the solution of a problem which concerns only it and them and in which there is no common meeting point so far as Sweden, Switzerland, Danzig and Hungary are concerned.

§ 24. Changes in Taxpayers' Personal Circumstances.

ARTICLE XX

SPECIAL ALLOWANCES SHALL BE DETERMINED BY THE FINANCE MINISTERS OF THE CONTRACTING STATES IN CASES IN WHICH SUBSTANTIAL CHANGES IN THE PERSONAL CIRCUMSTANCES OF TAXPAYERS OCCUR BETWEEN THE EFFECTIVE DATES OF CERTAIN SORTS OF TAXES AND WHICH INVOLVE DOUBLE TAXATION.

Five of the treaties studied include a statement as to these allowances. A typical provision is found in Arti-

cle II of the Austro-Czech treaty, which reads as follows:[77]

"(1) If changes in the personal circumstances of a taxpayer have occurred in the period between March 1, 1919 and June 30, 1920, affecting his fiscal obligations and involving double taxation, allowance shall be made for the amount paid in respect of the Austrian capital levy in calculating the amount due in respect of the Czechoslovak capital levy to an extent not exceeding one-half of the latter levy.

"(2) If changes in the distribution of a taxpayer's investments have occurred between March 1, 1919 and June 30, 1920, involving double taxation, allowance shall be made for the amount paid in respect of the Czechoslovak capital levy in calculating the amount due in respect of the Austrian capital levy to an extent not exceeding one-half of the latter levy.

"(3) If a transfer of property has taken place in consequence of death or as a gift *inter vivos*, involving double taxation, the property subject to double taxation shall be taxed in both contracting states."

§ 25. Fiscal Treatment of Foreigners.

ARTICLE XXI

THE NATIONALS OF EACH STATE SHALL RECEIVE THE SAME TREATMENT IN FISCAL MATTERS, AND THE SAME JUDICIAL PROTECTION, FROM THE AUTHORITIES OF EACH OTHER CONTRACTING STATE AS ARE ACCORDED TO ITS NATIONALS.

THE NATIONALS OF ANY CONTRACTING STATE SHALL NOT BE TAXED BY ANY OTHER CONTRACTING STATE AT A HIGHER RATE THAN THE NATIONALS OF THE LAST-NAMED STATE. IF A NATIONAL OF ANY OF THE CONTRACTING STATES SHOULD BE LIABLE, UNDER THE

[77] Ibid., p. 23.

TERMS OF THE PRESENT TREATY, TO DIRECT TAXATION IN THE OTHER CONTRACTING STATE, THOUGH NOT DOMICILED THEREIN, HE SHALL NOT BE LIABLE ON THAT GROUND TO TAXATION ABOVE THE NORMAL RATE.

The preceding statement is adapted from the Austro-Hungarian treaty,[78] the only one in which such a provision appears.

§ 26. Mutual Assistance for Recovery of Taxes.

ARTICLE XXII

THE QUESTION OF MUTUAL ASSISTANCE FOR THE RECOVERY OF TAXES MAY BE SETTLED BY A SPECIAL CONVENTION.

The Polish-Czech treaty [79] makes settlement by special convention obligatory. It also speaks of the "forcible recovery of taxes."

The Austro-Hungarian convention [80] says that the two states "shall also afford each other mutual legal assistance in the collection of taxes" and adds:

> "The Finance Ministers of the two states, after agreeing on the main lines of their action, shall take the necessary executive measures to give effect to this provision, in particular, measures regarding the extent of the legal assistance to be afforded in the collection of taxes, and the machinery and the authorities through which such action is to be taken, as also in regard to the transfer of the sums recovered by execution, and the conversion of the same thus collected."

Similar provisions are found in certain treaties or in the protocols thereto.

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[78] Ibid., p. 49.
[79] Ibid., p. 55.
[80] Ibid., p. 49.

§ 27. Mutual Administrative Assistance.

ARTICLE XXIII

THE CONTRACTING STATES SHALL GIVE ASSISTANCE TO EACH OTHER AS REGARDS THE ASSESSING OF THE TAXES WHICH FORM THE SUBJECT OF THIS CONVENTION. THE FINANCE MINISTERS SHALL, BY AN EXCHANGE OF NOTES, SETTLE THE DETAILS FOR PUTTING THIS PROVISION INTO OPERATION.

Czechoslovakia's treaties with Hungary (from which the foregoing is adapted),[81] with Poland, and with Austria, contain some such provision. That with Poland states:[82]

> "The fiscal authorities of the two contracting Parties shall afford each other direct assistance in carrying out this convention. In dealing with applications for information, and replying thereto, the legal regulations for the preservation of administrative secrecy shall be observed. Official documents shall not be communicated. In correspondence between the authorities of the two countries, the Czechoslovak language or the Polish language, as the case may be shall be employed."

The one with Austria adds a paragraph reading:[83]

> "Special administrative organs may be established by agreements between the governments concerned for safeguarding the rights accorded to taxpayers by virtue of the present treaty."

§ 28. Ratification and Denunciation of Treaty.

ARTICLE XXIV

A. THE PRESENT TREATY, THE ORIGINAL TEXT OF WHICH IS DRAWN UP IN FRENCH AND GERMAN, SHALL BE RATIFIED AND THE INSTRUMENTS OF RATIFICATION SHALL BE EXCHANGED AS SOON AS POSSIBLE AT .....

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[81] Ibid., p. 33.
[82] Ibid., p. 55.
[83] Ibid., p. 25.

B. IT SHALL ENTER INTO FORCE ON THE DATE OF THE EXCHANGE OF THE INSTRUMENTS OF RATIFICATION AND SHALL REMAIN IN FORCE UNTIL IT IS DENOUNCED BY ONE OF THE CONTRACTING STATES, SUCH DENUNCIATION TO TAKE PLACE AT LEAST SIX MONTHS BEFORE THE EXPIRATION OF ANY CALENDAR YEAR. IF IT IS DENOUNCED WITHIN THE PRESCRIBED TIME-LIMIT, THE TREATY SHALL CEASE TO BE IN FORCE AT THE EXPIRATION OF THE CALENDAR YEAR IN QUESTION.

BOTH TEXTS OF THE TREATY SHALL BE AUTHENTIC. THE RATIFIED TREATY SHALL BE PUBLISHED IN BOTH THE AUTHENTIC TEXTS IN THE OFFICIAL COLLECTION OF LAWS OF EACH OF THE TWO STATES.

IN FAITH WHEREOF THE PLENIPOTENTIARIES OF THE HIGH CONTRACTING PARTIES HAVE SIGNED THE PRESENT TREATY AND THERETO AFFIXED THEIR SEALS.

The suggestion that the original text be in French and German is made to obviate the necessity of employing also Czech, Hungarian, Polish and Swedish. As a matter of fact each of the treaties was originally at least in German except those between Hungary and Czechoslovakia wherein French was used and between Poland and Czechoslovakia which was in Polish and Czech.

The variations in the requirements as to denunciation are not numerous. The text cited in this Article is the one usually employed in these conventions.

§ 29. **Conclusions.** What are the conclusions to be drawn from this effort?

The first undoubtedly is that if the articles in capital letters represent the dominant opinion among the eight nations which have expressed opinions on the subjects considered, there are too many exceptions to be noted. These exceptions consist of either directly conflicting principles found in certain treaties or omissions from the bilateral convention texts. For example, shall mortgage interest be taxed at residence or at origin? Is the failure

to mention reciprocal provisions concerning maritime shipping and air navigation in all but one treaty to be taken to mean disapproval of the provision by the other States, lack of interest in the matter, or merely that the subject was not considered by them? Two of the treaties included in this study mention the taxation of gifts *inter vivos*. Is the general failure to mention this subject to be construed as conflict of opinion, absence of provisions in national laws concerning it, or lack of ability to agree?

The second is that the lack of a commonly accepted definition of certain terms in all the states is a serious drawback to the drafting of a general convention. For example, if an architect practices a "liberal" profession, does the accountant also do so or is his a "lucrative" profession? Consider also the different interpretations placed on the terms "the seat of an enterprise" or "the real center of management," as against "headquarters" or "place of control."

The third is that too much has to be left to future determination, thus placing too heavy a burden on the taxpayer himself. See Article XVIII.

The fourth is that the provisions concerning withholding at the source operate against creditor states to the extent of putting a premium on that method of raising revenue. In other words, if a state does not have such a method in force at the time of the adoption of the treaty it might find it necessary to adopt such a plan in order not to be discriminated against by the terms of its own treaty.

The fifth is that where proration is to be applied it may be based on different rules as to property or income, or it may be based on fractions of the calendar or taxable year involved. Or the rules for residence may be modified by those pertaining to domicile.

§ 30. **An Explanation.** In the "Collection of International Agreements and Internal Legal Provisions for the Prevention of Double Taxation and Fiscal Evasion" from which the foregoing quotations in this chapter have been taken, the first agreements listed are those concerning direct taxes, both on income and capital, which make no distinction between personal and impersonal taxes. It is for this reason that frequent references have been made to capital taxes. Moreover, because those conventions contained provisions with regard to mutual assistance in matters of fiscal evasion, the multilateral treaty conceived to take the place of so many bilateral treaties, presented on pages 71 to 97 above, has necessarily had to include items which ought not to appear in a Simon-pure income tax agreement.

In addition to the ten treaties already studied, there fall under the same general heading three others quite different in structure and in matter of negotiation, those between France and the Saar, Denmark and Iceland, and Great Britain and the Irish Free State.

§ 31. **The French-Saar Agreement.** The French agreement with the Governing Commission of the Saar,[84] signed at Paris July 5, 1922, contains provisions concerning income taxes, a synopsis of which follows:

> 1. Persons owning immovable property or industrial, commercial, or agricultural establishments in France or in the Saar are liable to tax on the profits therefrom in the country where such property or business establishments are situated.
>
> 2. With the exception of the provision just stated taxes on income shall only be due to the country of domicile or habitual residence.
>
> 3. Workmen residing in workmen's barracks shall be deemed to have their domicile there, if

[84] Ibid., p. 28.

unmarried, and to have their domicile at the residence of their families, if married.

4. Persons domiciled in the Saar, even though legally resident in France, are not liable to the French *impôt général sur le revenu.*

5. In the case of a transfer of residence from France to the Saar or *vice versa* liability to tax in the country where the taxpayer was formerly resident shall continue for the fiscal period during which the change is made.

§ 32. **The Danish-Icelandic Agreement.** Denmark and Iceland have agreed to prevent four cases of double taxation as follows:[85]

First, if the Danish or Icelandic citizen possesses a permanent domicile in both these countries. In such a case his tax must be paid to the two governments, but to each usually at one-half the ordinary rate.

Second, where a citizen of one of these countries possesses a permanent domicile in one country and owns real estate or carries on business in the other. In such a case the country of his domicile shall tax him on his entire income but allow him a credit equal to the tax paid to the other.

Third, where a citizen of one of the countries, having a permanent domicile in the other, abandons it. In such a case his taxation by the country he has left shall cease at the end of the half-year period during which his removal took place.

Fourth, where a citizen of one of the countries maintains his domicile in his own country but is temporarily absent in the other for reasons of health or study, without engaging in business therein. In such a case he will not become taxable therein until the end of one year of residence.

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[85] Ibid., pp. 60–61.

§ 33. **The British-Irish Accord.** Great Britain and the Irish Free State by the terms of their agreement [86] have made a clear-cut departure from the schemes previously outlined by providing in part that:

Article I

(a) Any person who proves to the satisfaction of the Commissioners of Inland Revenue that for any year he is resident in the Irish Free State and is not resident in Great Britain or Northern Ireland shall be entitled to exemption from British Income tax for that year in respect of all property situated and all profits or gains arising in Great Britain or Northern Ireland and to exemption from British supertax for that year.

(b) (A similar provision concerning residents in Great Britain or Northern Ireland.)

(c) Exemption under this Article may be given by discharge or by repayment of the tax, or otherwise, as the case may require.

Article II

(Rules for relief in event of dual residence.)

Article III

(Items exempted by one government may be taxed by the government of the taxpayer's residence.)

Article IV

A British or Irish company "shall be deemed to be a resident in the country only in which its business is managed or controlled."

By this convention each of these two countries surrendered all right to tax nonresidents on income from sources within its territorial limits and provided for relief from the burden of double taxation in the case of persons who are residents of both countries.

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[86] The text of this agreement is found in the Financial Act (Great Britain) 1926, quoted in C. 345, p. 56.

CHAPTER VII

GENERAL DOUBLE TAXATION TREATIES DISTINGUISHING BETWEEN PERSONAL AND IMPERSONAL TAXES

§ 1. The General Convention.
§ 2. Three Other Italian Conventions.
§ 3. Personal and Impersonal Taxes Distinguished.
§ 4. Cédulaire and Schedular Taxes Distinguished.
§ 5. Italy's Treaties with Austria and Czechoslovakia—Impersonal Taxes.
§ 6. Italy's Treaties with Austria and Czechoslovakia—Personal Taxes.
§ 7. Discussion of Graduated Rates for Personal Taxes.
§ 8. Residence.
§ 9. The German-Italian Treaty.
§ 10. Important Definitions.
§ 11. Nationality and Residence.
§ 12. Maritime Shipping.
§ 13. Dividends.
§ 14. Directors' Fees.
§ 15. Corporations.
§ 16. The German and Hungarian Protocols.
§ 17. Hungary's Treaties with Jugoslavia and Poland.
§ 18. The Polish-Hungarian Treaty.

§ 1. The General Convention. Representatives of the Italian, Austrian, Hungarian, Polish, Roumanian, and Jugo-Slavian Governments met at Rome and on April 6, 1922, adopted a multilateral treaty for avoiding double taxation of income and capital. It not only was the first general convention as distinguished from a bilateral agreement on this subject, but it is the only one so drafted and signed. But unfortunately so far as the use of a single convention instead of many is concerned it was ratified only by the Roman and Viennese authorities

and was published as in effect between Italy and Austria in the *Bundesgesetzblatt* of Austria under date of November 30, 1926, more than four years and seven months after it was signed.[1]

§ 2. **Three Other Italian Conventions.** In the meanwhile, on March 1, 1924, Italy had concluded a treaty with Czechoslovakia which follows very closely the general convention referred to in the preceding paragraph.[2]

On October 31, 1925, Germany,[3] and on November 25, 1925, Hungary[4] signed conventions relative to double taxation with Italy along almost identical lines, except for the inclusion in the former of three provisions not found in the latter, and certain items referred to on pages 113–114. One relates to maritime shipping, with which Hungary is not concerned but Germany is. A second relates solely to Germany's method of taxing dividends, and the third to a special tax on directors' fees, not within the purview of Hungarian corporation arrangements. There are, moreover, many points of difference between the first two and second two treaties to be discussed in succeeding paragraphs.

§ 3. **Personal and Impersonal Taxes Distinguished.** These four treaties all distinguish between personal and impersonal taxes. In the first two, the term "impersonal tax" is understood (but is not defined) to mean a tax applied to a particular kind of income irrespective of its recipient, while "personal taxation" is understood as applicable to the sum of certain items in a taxpayer's entire income. The words "personal" and "impersonal" are not used in the General Convention, but appear in

[1] C. 345, p. 73.
[2] Ibid., p. 76.
[3] Ibid., p. 80.
[4] Ibid., p. 87.

the Italian-Czechoslovakian Agreement. In the second group of two treaties a specific list of taxes is furnished with a statement as to which are "impersonal" and which are "personal." There is, moreover, a definition of "direct taxation" as employed therein and a statement of what forms of indirect taxes are specifically excluded from the scope of the convention.[5]

§ 4. Cédulaire and Schedular Taxes Distinguished. All impersonal taxation is *cédulaire* in its nature in that it applies to schedules of income and not to classes of taxpayers. It is *cédulaire* not schedular, because the schedular classification used in Great Britain for ease in administrative matters has only an etymological resemblance to the *cédulaire* taxes of Italy and certain other states. *Cédulaire* taxation applies to income according to its nature or classification, and in certain cases is imposed by the country of origin of the income, in others by the country of residence of the recipient of the income, and in others it is divided according to an agreed-upon rule.[6]

§ 5. Italy's Treaties with Austria and Czechoslovakia —Impersonal Taxes. A synopsis of Italy's treaties in force with Austria and Czechoslovakia reveals the following concerning impersonal taxes:[7]

Article 1

Income from land and buildings is taxable by the state where the property is situated.

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[5] Ibid., p. 80.

[6] Cf. T. I. B. 523, p. 3, "In general the impersonal taxes apply to the same items of income that were allocated to the country of origin in earlier treaties."

[7] C. 345, pp. 73–75.

Article 2

A. Interest on mortgages is taxable by the states where the immovable property is situated.

B. Interest on public (state, province, municipality, commune) funded securities is taxable by the state issuing same or by the state in which the province, municipality, or commune issuing them is located.

C. Interest on bonds issued by corporations, joint-stock companies, banks, or other credit institutions is taxable by the state in which the debtor is established.

D. Interest on bank deposits (savings or current account) is taxable by the state in which the bank (or the branch paying the interest) is situated.

E. All other income (dividends on shares and interest on personal loans, for example) from movable capital (transferable securities) is taxable by state in which the recipient has his residence.

Article 3

A. Income from the practice of a liberal profession is taxable in the state where the profession in question is habitually exercised.

B. Salaries, wages, etc., are taxable in the state where the services are rendered for which the compensation is paid.

C. Compensation for public services is taxable in the state which pays (or one of whose political units pays) such compensation.

Article 4

A. The income derived from a commercial or industrial undertaking is taxable by the state in which its legally recognized headquarters are located, even though the undertaking extends its activities to the territory of the other state.

B. If the undertaking, however, has establishments in both the contracting states, each state may tax that part of the income derived from within its borders, as may be determined by an equitable apportionment, agreed to by the financial authorities of the two states.

Article 5

Every other kind of income not scheduled in Articles 1 to 4 inclusive (for example life annuities) may be taxed by the state of the recipient of such income.

§ 6. Italy's Treaties with Austria and Czechoslovakia —Personal Taxes. To illustrate the working of the rule concerning personal taxes, let us assume that M. N. lives in Rome with his family and that he has the following income:

				Lire
From	Article	1	Rents on Czechoslovak Property.....	10,000
"	"	2A	Interest on Mortgages on Austrian Property	15,000
"	"	2B	City of Rome Bonds.....	10,000
"	"	2B	City of Prague Bonds.....	10,000
"	"	2C	Bonds of Austrian Corporations.....	15,000
"	"	2D	Bank Deposits in Czechoslovakia.....	500
"	"	2E	Dividends on Stock of Italian Company..	20,000
"	"	2E	Dividends on Stock of British Company..	10,000
"	"	2E	Dividends on Stock of Austrian Company	2,000
"	"	3A	A Professional Income—Engineer—Office in Rome	100,000
"	"	3B	Salary as Assistant Manager, Rome Branch of Austrian Corporation.....	20,000
"	"	3C	Pension from Austrian Government.....	1,200
"	"	4B	Gains from Industrial Undertaking Half of Whose Income Was from Italian and One Quarter Each from Czech and Austrian Sources	60,000
"	"	5	Life Annuity (Czech Company the payer)	10,000
			Total Lire	283,700

Austria would be entitled to levy its personal tax[8] against M. N. on the sum of the following items:

			Lire
Article	2A	Interest on Mortgage on Austrian Property....	15,000
"	3C	Pension for services rendered in Austria to Austrian Government	1,200
"	4B	Gains from Industrial Undertaking.....	15,000
		Total Lire	31,200

Czechoslovakia would be entitled to levy its personal tax[9] against M. N. on the sum of the following items:

			Lire
Article	1	Rents from Czechoslovak Property.....	10,000
"	4B	Gains from Industrial Undertaking.....	15,000
		Total Lire	25,000

Italy would be entitled to levy its personal tax against M. N. on the difference between his total income (283,700 lire) and the sum of the items taxed by Austria (31,200 lire) and Czechoslovakia (25,000 lire), or on 227,500 lire, because he is a resident of Italy.

Each country would be required to make no discrimination on account of nationality of the taxpayers. In fact nationality is a factor under these treaties only when there arises the question of diplomatic, consular, or other official governmental status. The taxpayer, M. N., in the illustration would pay 3 graduated taxes each called "personal" under these treaties. This concept of "personal" is quite at variance, however, with that in general use among English-speaking authorities.

§ 7. Discussion of Graduated Rates for Personal Taxes. It will at once be seen, however, that in the ordinary set of circumstances, the graduated rates applicable

[8] Ibid., p. 74.
[9] Ibid., p. 77.

by three governments would not produce personal taxes as great as would be due from M. N. if only one government levied its graduated "complementary tax" or surtax—personal tax—on M. N.'s entire income. The sum of three thirds does not equal one whole if rates are truly graduated.

Now the basis for the above distribution, which in many cases does not follow that for impersonal taxes, is that the state of the taxpayer's residence may levy a "personal" tax on all items except four. These are income (1) from landed property, (2) from mortgages, (3) from industrial and commercial undertakings, not carried on by shareholders' companies, and (4) from work. And these four are subject to personal taxation by the state which is allowed under the treaty to assess the impersonal taxes.[10] Thus, we see that the 10,000 lire interest on city of Prague bonds does not fall within one of the four exceptions, nor for that matter any items under Article 2 of the treaty except interest on mortgages secured on property outside the state of the taxpayer's residence. For the same reason a life annuity received by M. N. from a Czech insurance company would not be taxable by the Czechoslovak Government under the treaty with Italy.

§ 8. **Residence.** The treaty further provides:[11]

> "For the purposes of this provision, the taxpayer shall be held to be resident in the place in which he habitually resides in circumstances which warrant the presumption that he intends to continue to reside therein.
>
> "Should the taxpayer have two or more places of residence, the financial authorities of the two

[10] Ibid., pp. 74 and 77.
[11] C. 345, p. 77.

contracting states shall settle by agreement the division of the income in question.

"Should the taxpayer possess no residence coming within the above definition, his income may be taxed on the sole basis of the place in which he is staying."

The words above quoted are found in the Convention with Czechoslovakia and differ but slightly from the statement in the General Convention signed at Rome.

§ 9. **The German-Italian Treaty.** When Germany and Italy signed their convention for the prevention of double imposition of direct taxes that fact was important because of the position these countries occupy. Germany, the leading nation of Central Europe, had already ratified partial or complete double taxation agreements, relative to income or successions with Austria (1922), Czechoslovakia (1921), Danzig (1923), Greece (1910), Hungary (1923), Netherlands (1899), Poland (1923), Saar (1921), Switzerland (1923), United States of America (1924),[12] the U. S. S. R. (1925). Italy, the leader among the Southern European States, had already in force those double taxation agreements which we have already cited and a reciprocal agreement with the United States concerning maritime shipping.[13]

There are many significant differences between Italy's treaty with Germany and hers with Czechoslovakia and Austria which we have just finished examining.

§ 10. **Important Definitions.** The treaty with Germany is notable for important definitions not found in the earlier ones, for the use of "nationality" as a basis of taxation in certain cases, for a special provision con-

[12] Ibid., pp. 241–242.
[13] Ibid., p. 241.

cerning maritime shipping, others relative to dividends which are new, and finally for the rulings about directors' fees and corporation taxes.

In the matter of definition we have these four:[14]

Direct taxation is that levied directly on income, gross or net, or on personal capital either on behalf of the two contracting states or on behalf of the states of the German Reich or the provinces or groups of provinces, communes and groups of communes, even when in the form of "supplementary" taxation.

Impersonal taxation is that levied in respect of single objects liable to taxation on the basis of their economic connection with the territory of the state.

Personal taxation is that levied in respect of the whole body of objects liable to taxation—property or income—belonging to one individual or with regard to the taxpayer's nationality, residence or sojourn.

"Habitual and usual sojourn" or just "sojourn" is "taken to mean a permanent sojourn in the state under circumstances such as to warrant" the presumption that such stay is not occasional.

§ 11. **Nationality and Residence.** As to nationality of the taxpayer there are three references, all of which are found in the paragraphs dealing with residence under Article 13 of the treaty.[15]

The first is that if a taxpayer possesses a residence both in Germany and Italy the impersonal tax on income from transferable securities (with two exceptions) and from annuities and other income not scheduled in the treaty shall be collected only by the state of which the taxpayer is a *national*. The same rule applies if he has a residence in neither country but is a *national* of one.

[14] Ibid., pp. 80 and 83.
[15] Ibid., p. 83.

This is an absolutely different concept from that found in the earlier Italian double taxation treaties.

The second reference provides that (1) "sojourn" when it is outside both the contracting states shall be reckoned in favor of the state of which the taxpayer is a national and that (2) "should the taxpayer usually and habitually sojourn in neither of the contracting states," a personal taxation shall be levied only by the state of which the taxpayer is a *national.*

§ 12. **Maritime Shipping.** Article 4 provides that impersonal taxation on income from maritime shipping enterprises shall be levied solely by the state in which the actual business center of the enterprise is situated. This provision is in harmony with the original Dutch and subsequent American law on this subject to which reference has already been made on page 11.

§ 13. **Dividends.** Article 5 deals in three paragraphs with the taxation of dividends.[16] To understand it, however, we must be familiar with the existing Italian and German laws on that subject. Italy imposes no tax at the source, no *impôt réel,* on dividends, but requires a resident of Italy who receives them to include them in his total income for purposes of the personal tax. Italy taxes the corporation directly but not the shareholders. Germany on the other hand directly subjects the profits of the corporation to a 10 per cent tax and requires it to withhold at the source another 10 per cent tax assessed for the credit of the shareholders. The first paragraph of Article 5 of the Convention reads as follows:

> "Impersonal taxation leviable on the dividends of commercial companies, treated not as income of the individual owners of shares, but forming part

[16] Ibid., p. 81.

> of the whole industrial or commercial yield of the company which distributes them, shall be levied according to the rules laid down in Articles 3 and 4 of the present convention," i. e. as laid down for the taxation of business undertakings, industrial or commercial (Art. 3) or maritime shipping (Art. 4).

In other words the foregoing provision recognizes Germany's right to the second 10 per cent tax on corporation profits and of course Italy's right not to treat dividends (for impersonal tax purposes) as a part of the individual shareholder's income.

The second paragraph provides if either state shall introduce impersonal taxation of dividends as an item of the individual stockholder's income, the tax shall be levied thereon by the state in which is situated the head office of the company. This does away with any possibility of having to prorate the same dividends between countries.

The third rule is that the same principle applies if the participation in the company's profits is not on the basis of shares but of other transferable securities analogous thereto, but it does not apply to shares in commercial and industrial partnerships and similar forms of business organization. In these last mentioned cases the rules of Articles 3 and 4 are to be enforced.

§ 14. Directors' Fees. The next Article of the treaty deals with directors' fees. These fees are not the sort paid by American corporations for attendance at meetings, but represent a certain distribution to the managers or directors out of the profits of the company. In lieu of the vagueness of the rule laid down in the General Convention that "taxes on directors' fees . . . shall . . . be levied according to the internal legis-

lation of each state,'' [17] the German-Italian agreement is that they ''shall be levied by the state in which the head office or real business center of the undertaking is situated.'' [18] A derogation is to be noted only if the real center is in one state and the actual business is transacted in the other. In that case ''the central fiscal authorities of the two states shall conclude an agreement from time to time with a view to an equitable allocation.''

§ 15. **Corporations.** The last difference of importance between Italy's treaty with Germany on the one hand, and Italy's with Austria and Czechoslovakia, on the other, is that the one with Germany specifically provides in unmistakable terms for a tax on corporations as such. Two such references occur. The first is the statement that, within the purview of the convention there shall be included among other German taxes construed as *impersonal,* the *Körperschaftssteuer* (tax on corporate bodies), in so far as such taxation is levied without regard to the head office or the actual business center of the undertaking.[19] The second is in Article 13 and reads as follows:

> ''For the purpose of the present convention, the residence of corporate bodies shall be taken to be the place in which the corporate body has its head office.''

Quite similar to the German-Italian convention signed at Rome October 31, 1925, is that between Italy and Hungary signed less than a month later. The latter differs from the former in only two essentials. It mentions specifically that bank deposit interest shall be subject to impersonal taxation ''solely by the state of which the

[17] Ibid., p. 74.
[18] Ibid., p. 81.
[19] Ibid., p. 80.

debtor is a national." The German treaty is silent on this point. In addition, a definite change in rules is made with regard to the basis of computing taxes if the taxpayer possesses a residence in the two contracting states. The German convention says in such case "the impersonal taxation leviable in respect of the income for which a rule is laid down in Article 8 and Article 10 shall be levied solely by the state of which the taxpayer is a national." The Hungarian agreement does not so provide. In speaking, however, of the personal tax it says that the two contracting states shall levy taxation in proportion to the respective periods of sojourn during the year. . . . Sojourn outside both contracting states shall be reckoned in favor of the state of which the taxpayer is a national."[20] Nothing corresponding to this appears in the German-Italian convention.

§ 16. The German and Hungarian Protocols. In the final protocol of each of these two treaties was inserted a paragraph dealing with affiliated companies which had its echo in the General Meeting of Government Experts at Geneva in October, 1928, when "affiliated companies" were discussed. The text of the protocols on this point follows:

> "Should there already exist or be in future established in one of the two states an undertaking which, although legally autonomous under the civil law, is so intimately connected with or stands in a relationship of such dependence on, or possesses such unity of interests with, a legally autonomous undertaking in the territory of the other state as to render the two undertakings economically one and to cause the former under-

[20] Ibid., p. 88.

> taking to be regarded, in accordance with the fiscal legislation of the state in which it is situated, as an establishment of the undertaking existing in the other states, the rules laid down in Article 3, third and fourth paragraph, of the convention shall apply."

Other items in the various Italian treaty protocols are natural interpretations of the provisions of the articles of those treaties.

§ 17. Hungary's Treaties with Jugoslavia and Poland. Hungary in the early part of 1928 signed two double-taxation conventions, general in scope, and distinguishing between personal and impersonal taxation. One was with Jugoslavia, the other with Poland. At the time of the publication of the League volume of Double-Taxation treaties in October 1928, the existence of these agreements was not known. Even a year later when the first supplement to the collection of international agreements was published (October, 1929) these treaties were not included. They have now been included in supplement No. 2 to that collection of treaties.

An examination of the Hungarian-Jugoslav convention shows it to follow more closely the form and style of the Italian-German treaty than any other double-taxation agreement. Yet even between these two there are many points of real difference. (For brevity's sake in this comparative study we shall refer to the Hungarian-Jugoslav treaty as the Jugo-Slav, to the Hungarian-Polish treaty as the Polish, and to the Italian-German treaty as the German treaty. "Convention" or "accord" or "agreement" or "understanding" may be used for variety's sake, but without any implied difference in meaning.)

The German and Jugo-Slav treaties in Article I differ in that the former specifically enumerates the taxes affected while the latter on this point provides:[21]

> "With a view to the application of the present convention, the Ministries of Finance of the two states shall inform each other at the end of each calendar year of the taxes which are to be regarded as direct taxes, and the taxes in that group which are to be regarded as impersonal or personal taxes."

In Article 3, there are provisions for the taxation of income from commercial and industrial enterprises. In the German agreement there is, however, a paragraph which sets forth the circumstances when a demand may be made for the submission of general or special balance sheets or any other documents provided for under the legislation of the state concerned. There is no corresponding authority in the Jugo-Slav convention.

When we compare Article 6 of the Jugo-Slav with Article 8 of the German treaty, we find diametrically opposite provisions set forth. The former reads:[21]

> "Income derived from the employment of floating capital shall be liable to direct taxation in the state in which the debtor is domiciled."

The latter, on the other hand, lays down this broad principle:

> "Impersonal taxation leviable on income derived from the investment of funds shall only be levied by the state in which the investor is domiciled. . . ."

Then follow two exceptions, one relating to mortgage interest, the other to interest on certain governmental loans.

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[21] 1930 Supplement.

The Jugo-Slav treaty then adds a unique provision concerning the taxation of interest on mortgages secured by property located in both the contracting states. It is unique in that so far as the writer is aware it appears in no other treaty, and further in the sense that it apparently makes a fifty-fifty distribution of the tax imperative irrespective of how much land is in one country and how much in the other, just so long as the international boundary is crossed. Of course, similar provisions could be found only in the case of treaties between contiguous states.

In the Jugo-Slav treaty the word "domicile" is used in the English translation, prepared by the League Secretariat. The French text says "domicile." In the German treaty, however, the same French word "domicile" is used, but it is there translated into English as "residence," while later on in the French text of the German treaty, the phrase *"Si le contribuable n'a pas non plus de résidence durable"* appears and is translated into English: "Should the taxpayer usually and habitually sojourn in neither of the contracting states." Nevertheless the definitions to be attributed to "domicile" in the English version of the Jugo-Slav treaty, and to "residence" in the English version of the Germany treaty are substantially identical since in the French text they are as follows:

> *"Le lieu où le contribuable a une demeure habituelle dans des conditions qui permettent de conclure à son intention de la conserver."* (German treaty.)
>
> *"Le lieu où le contribuable a sa demeure habituelle sous des indices permettant la présomption qu'il ait l'intention de la maintenir, ou le lieu où le contribuable séjourne sous des indices permettant la présomption que son séjour n'est pas seulement transitoire."* (Jugo-Slav treaty.)

The provision, however, for computing the taxes due is more elaborately set forth in the German than in the Jugo-Slav understanding in the case of double domicile.

The Jugo-Slav treaty, unlike the German one, contains one paragraph dealing with taxes on future increments of one's total estate, and another which provides:[22]

> "From the point of view of taxation, including proceedings before revenue authorities, courts of law, and revenue and administrative tribunals, the nationals of either contracting party shall be entitled, in the territory of the other party, to the same treatment as nationals of the country."

Italy and Germany not being neighboring states, but each being interested in maritime navigation, provided for the prevention of double taxation of maritime shipping income. On the other hand, Jugoslavia and Hungary, having a common interest in the use of the Danube, set forth in their treaty a clear statement of how they would prevent double taxation of profits of "shipping undertakings on the Danube."

In other respects the treaty between Jugoslavia and Hungary follows the generally accepted lines already outlined and discussed in detail in the earlier part of this chapter.

§ 18. The Polish-Hungarian Treaty. The Polish treaty differs from the Jugo-Slav in carefully enumerating the exact taxes brought within its scope instead of leaving them for future determination. There is mention made of the fact that under both Hungarian and Polish law the income tax is to be considered personal. This use of the words "income tax" is likely to be confusing to English-speaking readers. In the sense in

[22] 1930 Supplement.

which they are used in that treaty, however, they mean, what in English is ordinarily termed the *surtax* or *supertax*. In other words, this tax takes into account the whole of the Polish or Hungarian income and is not concerned with the *cédulaire* impositions on various items going to make up the total. Power is given to the financial authorities of the contracting states to revise the list from year to year.

A more detailed statement is found in the Polish than in the Jugo-Slav treaty as to the meaning of the term "establishment" in the sense of an industrial, commercial, banking, insurance undertaking. In addition, in the Polish convention it is agreed:[23]

> "The purchase of native raw materials, agricultural and forestry products, livestock, poultry and miscellaneous goods, in so far as it takes place in the territory of one of the two contracting states either for future sale in the territory itself or for purposes of export, shall be liable to taxation in the state in whose territory the purchase was made, even if the purchaser does not maintain any establishment in the said territory."

In no other double-taxation treaty is any similar provision found. In fact without exception all such general treaties make the maintenance of a business establishment the essential test as to taxability. Note, for example, the agreement between Poland and Danzig on this point, which reads as follows:[24]

> "If the activities of a commercial undertaking situated in the territory of one contracting party extend to the territory of the other party without, however, there being a business installation

[23] 1930 Supplement.
[24] C. 345, p. 41.

> . . . in the latter territory, direct taxes may only be levied by that party in whose territory a business installation is situated."

In other particulars, the Polish-Hungarian treaty follows the general provisions of other agreements which distinguish between personal and impersonal taxes.

CHAPTER VIII

TAX AGREEMENTS AFFECTING SHIPPING ONLY

§ 1. Introduction.
§ 2. The Netherlands.
§ 3. The United States.
§ 4. Norway.
§ 5. Great Britain and Northern Ireland.
§ 6. Italy.
§ 7. France.
§ 8. Germany.
§ 9. Japan.
§ 10. Canada.
§ 11. Other Countries.
§ 12. Danube Shipping.
§ 13. Conclusions.

§ 1. Introduction. In this chapter two sorts of tax agreements dealing with shipping profits will be mentioned. The first relates to maritime undertakings, the second to those operating on the Danube River.

§ 2. The Netherlands. It has already been pointed out (page 11) that Holland in 1910, first of all the nations, introduced into her revenue system a provision for the reciprocal exemption of *foreign ships* and that since 1914 her law had contained an exemption from tax on the income of ships flying flags of foreign nations, on condition of reciprocity. The present Dutch law on this point (No. 209 of June 26, 1926) reads as follows:[1]

"We Wilhelmina,

. . . . . .

Considering that it is desirable to lay down stipulations by which double taxation may be prevented

[1] C. 345, p. 172.

in the case of profits accruing from the business of shipping.....

Sole Article

"We reserve THE RIGHT:

"1. To confirm agreements concluded with foreign Powers whereby, subject to reciprocity, double taxation is avoided in the case of profits accruing from the business of shipping.

"2. Subject to reciprocity to make regulations whereby in conjunction with the provisions on this subject contained in the laws of a foreign state, double taxation is avoided in the case of profits accruing from the business of shipping."

Acting on this authority and similar provisions in other of its national laws, the Netherlands concluded agreements to prevent the double taxation of shipping profits with Great Britain on May 20, 1926,[2] with the United States on October 1, 1926,[2] with Norway on January 11, 1929,[3] with France on February 15, 1930, and with Canada on May 6, 1930.[4]

§ 3. **The United States.** In 1921 there was inserted in an American Revenue Act for the first time a provision of similar purport to the foregoing. It has been reënacted in each of the three subsequent American income tax laws, those of 1924, 1926 and 1928. The wording in the Act of 1928 is typical. It states that there shall be exempt:[5]

"The income of nonresident alien or foreign corporation which consists exclusively of earnings derived from the operation of a ship or ships docu-

[2] Ibid., p. 246.
[3] 1929 Supplement, p. 23.
[4] 1930 Supplement.
[5] U. S. Revenue Act of 1928, sections 212(b) and 230(b).

> mented under the laws of a foreign country which grants an equivalent exemption to citizens of the United States and to corporations organized in the United States."

The American Commissioner of Internal Revenue has very liberally construed this section.[6] The word "exclusively" in the paragraph quoted has not been used as a bar to prevent the granting of the contemplated exemption. If the income of a shipping concern has been only incidentally augmented by interest items or warehouse or storage collections, the Commissioner has held that that fact should not operate to deny such a nonresident alien individual or foreign corporation complete exemption. In addition, if no income tax is levied by a foreign country, ships flying its flag are free from liability to American income tax when owned by a non-American corporation or an individual not resident in the United States. This exemption is based on implication and a sense of justice and not on a strict reading of the law. In this study, however, we are not interested in learning what countries have no income taxation and so may omit from our consideration the exemption of the income of Argentine, Bulgarian, Egyptian, Paraguayan, Persian, St. Lucian, Siamese, Straits Settlements, or Venezuelan shipping concerns or individuals from American income tax. Especially is this true when it is remembered that every important maritime nation has an income tax law. All of the agreements which the United States has made with regard to the exemption of foreign shipping profits have been with retroactive effect to January 1, 1921, except that with Japan, effective as from July 18, 1924.[7]

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[6] Reg. 74, Income Tax, pp. 278, 279, and 284.

[7] C. 345, p. 131.

These understandings were in some cases embodied in an exchange of notes, others were as decrees. Their dates follow: [8]

With Denmark	December 4, 1922
Iceland	December 4, 1922
Great Britain	November 7, 1924
Germany	December 9, 1924
Sweden [9]	
Norway	March 24, 1925
Italy	March 4, 1926
Japan	June 8, 1926
Netherlands	October 1, 1926
France	May 20, 1927
Canada	September 17, 1928

§ 4. **Norway.** It was mentioned on page 12 that Norway had in the pre-war days included a reciprocal shipping provision in its law—and that it is still in force. It reads as follows: [10]

> "Persons, companies and organisations domiciled in a foreign country shall be exempt from taxation on their capital invested in, and income derived from, vessels plying to Norwegian ports or between Norwegian ports, and on income from the sale of tickets for the conveyance of persons out of the country, on condition that Norwegian persons, companies and organisations are exempt from taxation on similar operations in the country in question. If this condition is not fulfilled, His Majesty may direct that foreign persons, companies and organisations shall pay tax on their capital invested in, and/or income derived from,

[8] Ibid., p. 248 and 1929 Supplement, pp. 20–22.

[9] Mentioned in Reg. 74, Income Tax, p. 278, but not in C. 345.

[10] Codified Fiscal Law of August 18, 1911, Chapter II, paragraph 15, quoted in C. 345, p. 174.

> the said operations. Nevertheless, in respect of income derived from the sale of tickets for the conveyance of persons out of the country, this provision shall only apply if the sale is effected through an agent or representative within the meaning of the Emigration Act of May 22, 1869 (of Law of June 5, 1897, and Law No. 1 of September 16, 1921) His Majesty will issue further regulations regarding the extent of liability to tax and the assessment and collection of tax."

In League Document C.345 M.102 1928. II, Norway is shown to have acted on the section of law mentioned, only in the cases of Great Britain and the United States.[11] While the Meeting of Government Experts was being held at Geneva, word came, however, that the Norwegian authorities had on October 29, 1928, signed a maritime shipping agreement with Belgium.

As late as August, 1930, however, that treaty had not been registered at the Secretariat of the League. On January 11, 1929, Norway and the Netherlands signed a similar treaty at the Hague.[12]

§ 5. **Great Britain and Northern Ireland.** It is provided in sub-section (1) of section eighteen of the Finance Act of 1923 of Great Britain that if His Majesty in Council is pleased to declare:[13]

> "(a) That any profits or gains arising from the business of shipping which are chargeable to British income tax are also chargeable to income tax payable under the law in force in any foreign State; and
>
> "(b) That arrangements, as specified in the Declaration, have been made with the government

[11] C. 345, p. 246.
[12] 1929 Supplement, pp. 23–24.
[13] C. 345, p. 127.

> of that foreign state with a view to the granting of relief in cases where such profits and gains are chargeable both to British income tax and to the income tax payable in the foreign state; then unless and until the Declaration is revoked by His Majesty in Council, the arrangements specified therein shall, so far as they relate to the relief to be granted from British income tax, have effect as if enacted in that Act, but only if and so long as the arrangements, so far as they relate to the relief to be granted from the income tax payable in the foreign state, have the effect of law in the foreign state."

In accordance therewith, His Majesty in Council was pleased to issue the appropriate declaration concerning the United States on November 7, 1924. This was the first of many similar declarations. The only difference is that the others all took the shape of formal treaties. British accords on this matter with other nations were signed as follows:[14]

With	Denmark	on December 18, 1924
	Norway	December 18, 1924
	Sweden	December 19, 1924
	Finland	November 18, 1925
	Netherlands	May 20, 1926
	Germany	January 17, 1928
	Iceland	April 27, 1928
	Greece	July 21, 1929
	Japan	August 10, 1929

In each case, a subsequent declaration was made by His Majesty in Council and published in the *London Gazette,* ordinarily after the lapse of about two months.

[14] Ibid., p. 243, and 1930 Supplement.

On the signing of the agreement between Great Britain and Germany a sort of protocol—in the form of identic notes signed by the plenipotentiaries—reading as follows,[15] was added:

> "In the Anglo-German Agreement for the exemption of shipping profits from double taxation which has been signed today, the English phrase 'managing and controlling such business' is used to describe the actual business management of a company. The German expression '*Ort der Leitung*' means the centre of the whole business direction. There does not appear, therefore, to be any material difference between the two expressions. In the case of the separation of the business and financial management of a company, the place of the business management shall be the determining one."

Here it is interesting to note that the Swedish Minister at London, on December, 1924, sent to the British secretary of State for Foreign Affairs a letter containing a unilateral declaration relative to the treaty he had just signed on behalf of Sweden with Great Britain which in part reads as follows:[16]

> "With regard to the liability for foreigners not resident in Sweden to pay taxes on profits accruing from business, the Swedish taxation laws contain regulations to the effect that only business carried on in Sweden can be subject to taxation. In accordance with this principle no foreigner—not resident in Sweden—has, as far as is ascertained, been taxed on profits arising from business of shipping. Should, however, such a case in the future come before a Swedish taxation authority

[15] C. 345, pp. 135–6.
[16] Ibid., p. 129.

and should this authority decide the nonresident foreigner involved in the matter to be liable to this kind of taxation, I am directed to declare herewith that in the opinion of the Swedish Government the above-mentioned Agreement, in view of its Article 4, would thereby at once cease to have effect."

§ 6. **Italy.** On the basis of a royal decree dated May 5, 1925, Italy adopted the plan of reciprocal exemption of foreign ships from its taxation. The significant section of the decree is as follows: [17]

"The government is hereby empowered to exempt foreign shipping corporations or companies having their headquarters and main business establishments abroad and having branches of their own, or agencies or representatives in Italy, from movable property tax on the income they derive from shipping business in Italian ports, provided that the same treatment is granted to Italian shipping corporations or companies, both in law and in fact by the countries to which the above-mentioned corporations or companies belong.

"Such exemption shall be granted by royal decree after consultation of the Council of Ministers."

§ 7. **France.** Similarly France provided in Article 5 of its law of April 29, 1926, for tax reciprocity in the matter of shipping profits, as follows: [18]

"Article 5

"The profits realized by maritime shipping undertakings established abroad and derived from operating foreign ships shall be exempt from taxa-

[17] Ibid., p. 17.
[18] Ibid., pp. 152–53.

tion, provided that the country whose flag is flown by the said ships grants an equivalent exemption to French shipping undertakings.

"The conditions of this exemption and the taxes covered by it shall be laid down for each country by means of a diplomatic agreement. They shall be specified in a decree countersigned by the Minister of Finance, and submitted within three months for legislative ratification.

"Profits realized in countries which have consented to the reciprocal exemption provided for in the preceding paragraph by maritime shipping undertakings having their seat in France shall be included in the assessment bases of the tax on industrial and commercial profits payable by these undertakings."

These Italian and French provisions were adopted by their respective national legislatures prior to the announcement of maritime tax reciprocity with the American Government.

France, acting under authority of the aforementioned and other similar laws and decrees, has now granted tax exemption on the profits of vessels owned and operated by American, Dutch, and Swedish citizens, not resident in France, or by corporations organized under the laws of the United States, the Netherlands, and Sweden. The agreement with Holland was effected through an exchange of notes dated December 19, 1929, January 27, and February 15, 1930. The notes exchanged between France and Sweden on this subject were dated December 19, 1929 and January 25, 1930.[19]

§ 8. **Germany.** Authority for the promulgation by Germany of her acceptance of the principle of reciprocity to prevent double taxation of shipping profits—in

[19] See 1930 Supplement.

so far as the United States is concerned—rests on section 108, paragraph 1, of the Reich Fiscal Code.[20] The instructions from the Reich Minister of Finance to put into effect such reciprocal agreements were dated August 10, 1923, January 5, and December 9, 1924.

In Chapter VII it was pointed out that Germany's treaty with Italy contained a provision concerning maritime shipping profits. It used the following language in Article 4:

> "Impersonal taxation leviable on income derived from maritime shipping enterprises shall be levied solely by the state in which the actual business centre of the enterprise is situated."

and in Article II, which reads in part as follows:

> "Personal taxation leviable on the taxpayer's total income shall be levied by each of the contracting states in accordance with the following rules:
>
> "(1) Income derived:
>
> (a) From immovable property;
>
> (b) From mortgage loans;
>
> (c) From industry or commerce, *including income derived from maritime shipping enterprises;*
>
> (d) From labour, including remuneration of services by public corporate bodies, shall be subject to the rules laid down for these categories of income in the Articles referring thereto."

By virtue of the German-Swedish treaty to which reference has already been made in Chapter VI, air-navigation as well as maritime shipping was included in the provisions for reciprocal exemption.

Reference has already been made to the accord with Great Britain on this subject, dated January 17, 1928.

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[20] C. 345, p. 154.

On April 17, 1930, Germany entered into a similar arrangement with Canada.[21]

§ 9. **Japan.** Under date of October 15, 1927, the Danish Minister at Tokio and the Japanese Minister of Foreign Affairs exchanged notes providing for the exemption of profits from "the business of shipping" from double taxation, on behalf of their respective governments.[22]

The authority on which the Japanese Minister of Foreign Affairs acted in this case is Law No. 7 of July 17, 1924, published in the Official Journal of July 18, 1924, and reads as follows:[23]

> "Foreigners or foreign legal persons not having their domicile in Japan shall be exempt from income tax in respect of vessels of foreign nationality. This shall not apply, however, if the same exemption is not granted on the income of vessels of Japanese nationality by the countries to which the foreign vessels belong."

Japan signed agreements on this subject, September 21, 1929, with Canada, and August 10, 1929, with Great Britain.[24]

§ 10. **Canada.** Section 4 m of the Revised Statutes of 1927, chapter 97, as amended,[25] provides that the income of nonresident persons or corporations arising within Canada from the operation of ships owned and operated by such persons or corporations may be exempt from taxation within Canada if the country where any such

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[21] 1930 Supplement.
[22] C. 345, pp. 133–34.
[23] 1929 Supplement, p. 33.
[24] 1930 Supplement.
[25] 1929 Supplement, p. 20.

person or corporation resides or is organized grants substantially an equivalent exemption in respect of the shipping business carried on therein by Canadian residents or Canadian corporations, and that the Minister of National Revenue may give effect to such exemption from the date on which such exemption granted by the country where the person or corporation resides took effect.

To date the Ministry of National Revenue of the Dominion of Canada has issued notice that agreements coming within the scope of the reciprocal exemption have been signed as follows—with the United States, the Netherlands, Sweden, Greece, Germany, and Japan.[26]

§ 11. **Other Countries.** The national legislation of certain other countries than the Netherlands, the United States, Norway, Great Britain, Italy, France, Germany, Japan and Canada authorizes the extension of the principle of reciprocity to certain classes of income taxation, but, so far as the writer is aware, no other countries specifically authorize the non-taxation of income, otherwise taxable, in the particular case of maritime shipping profits. For such additional national provisions the reader is referred to the Danish Law 73 of March 29, 1924 (Article 27), the Finnish Law 306 of December 5, 1924 (Article 3), and the Swedish Royal Decree No. 155 of May 22, 1925, and Nos. 370 and 373 of September 28, 1928. These and others that could be cited (Greek, Icelandic, Belgian) are general in their terms and are not in any sense especially concerned with maritime shipping but they constitute the basis for the exemption agreements they have entered into in this particular field.[27]

§ 12. **Danube Shipping.** Let us now turn again to a consideration of river shipping. On navigable rivers

[26] 1929 Supplement, pp. 20–21.
[27] Doc. C. 345, pp. 151, 152, 179, 199.

which flow beyond national boundaries traffic is carried in ships of different nations just as is the case on the oceans. One such river stands out above and beyond all others, the Danube. It rises in the Black Forest of Germany and successively passes through Austria, Czechoslovakia, Hungary and Jugoslavia, forms a part of the boundary between Bulgaria and Roumania, and empties into the Black Sea half way up the Roumanian coast. It is the international river *par excellence.* The capitals of Austria, Hungary and Jugoslavia are situated on its shores. The capitals of Czechoslovakia, Bulgaria, and Roumania are on its tributaries.

The first three formal tax treaties of the world which mentioned a shipping exemption were those signed by Hungary, the first with Czechoslovakia (Article 13), July 13, 1923, the second with Germany (Article 13), November 6, 1923, and the third with Austria (Article 14), November 8, 1924. Each was concerned with the Danube. None was concerned with maritime shipping. A typical provision is to the effect that "shipping undertakings on the Danube shall not be liable to duties (taxes) imposed in connection with the exercise of an industry except in the state in which the head office of the business center of the undertaking is situated." [28]

When the Austro-Czechoslovak agreement of February 18, 1922, was signed, it was provided by Article 4 of the Final Protocol thereto that "the taxing of railway and shipping undertakings which operate on the territory of both countries shall be settled in a separate treaty." [29] In harmony with that understanding, representatives of these two countries met in Vienna in July, 1926, and on the twelfth of that month signed a treaty relative to the taxation of railway and shipping enter-

[28] Ibid., p. 48.
[29] Ibid., p. 26.

prises. The "delimitation of sovereignty in fiscal matters" brought about by that convention (as the Austrian Statement of Reasons for the treaty shows) is "substantially in agreement with the system established by the Treaty with Hungary." [30]

The statements in the Austro-Czech treaty and in the protocol thereto, which directly concern shipping, are these:

> "The shipping enterprises of the two states on the Danube shall only be liable to pay taxes on profits in the state in which their head office is situated, and shall be taxable therein in respect of the whole of their shipping business.
>
> "Shipping business, for the purpose of the preceding paragraph, also includes operations directly connected with the transportation of passengers and goods and the maintenance of all necessary installations at ports of call (premises for negotiating freight contracts, plant for loading cargoes).
>
> "1. (a) The transport of goods on land effected by shipping enterprises in the locality where the port is situated shall be considered as operations directly connected with the shipping business, both as regards the collection of goods from the consignor, or from another transportation enterprise, or from the customs office, and their conveyance to the vessel, and as regards their delivery from the ship to the consignee or to another transportation enterprise, or to the customs office. This provision shall, however, only apply to the transportation of goods which have arrived or are to be forwarded by the vessels belonging to the enterprise concerned; if the latter conveys other goods, the whole of its transport

[30] Ibid., p. 121.

operations on land in the locality where the harbour is situated shall be treated as a separate enterprise in respect of commercial year during which such business is undertaken.

"(b) The same rule shall apply to the conveyance of passengers to and from the landing place in the locality where the harbour is situated.

"2. Agencies established in places which are not directly concerned in shipping operations shall not be regarded as directly connected with the shipping business with the exception of agencies which represent a shipping enterprise in the locality where the central authorities of the other state have their seat."

§ 13. **Conclusions.** The outstanding advantage of all these developments is that they do away with the rendering of reports to various governments, with the subsequent inevitable check-ups, through the elimination of any requirement for apportionment.

In Chapter III we pointed out the importance of the work done by the International Chamber of Commerce in securing the favorable consideration of special treatment for the business of shipping. Though at first not inclined to see why shipping should be favored over other businesses having establishments in different countries,[31] the International Chamber soon placed itself definitely on record in favor of the adoption of the principle of having each shipping enterprise pay taxes only to one government—that of the nation whose flag its ship flies, where its business center is, where it has its principal place of business, or under whose laws it is documented.

Next the Technical Experts helped to secure uniformity of treatment in this matter after they had heard the

[31] Brochure 25, p. 20.

testimony of those who had made special studies on the subject.

Credit is finally due to the Government Experts for their nearly world-wide unanimity of opinion that there ought to be no apportionment, no double report, no double taxation of shipping profits.

To date we find, therefore, that such international agreements have been approved by the counties mentioned to the extent of the number following their name (some of these are maritime, some river, some air-navigation conventions): Austria 2, Belgium 2, Canada 6, Czechoslovakia 2, Denmark 3, Finland 1, France 3, Germany 6, Great Britain 10, Greece 2, Hungary 4, Iceland 2, Italy 2, Japan 4, Jugoslavia 1, the Netherlands 5, Norway 4, Sweden 6 and the United States 11, a total of 37 bilateral agreements, affecting 19 countries. This list indicates that a good start has been made, but that the field has not yet been covered.

CHAPTER IX

OTHER SPECIAL DOUBLE-TAXATION TREATIES

§ 1. The Spanish-British Convention.
§ 2. The Spanish-French Convention.
§ 3. The Franco-Belgian Establishment Convention.
§ 4. Certain German Agreements.
§ 5. The Polish Arrangements.
§ 6. The Danish Arrangements.
§ 7. The German Treaty with the U. S. S. R.
§ 8. The German-Swiss Convention.
§ 9. German-Danzig Agreements.
§ 10. The German-Saar Agreement.

There remain ten international agreements to consider. With the exception of the Franco-Belgian "Establishment Convention," all the others are, so far as one party is concerned, either German or Spanish. The Spanish accords are with Great Britain, France, and Italy. The German are with Poland, Denmark, Danzig, the Saar, Russia, and Switzerland.

§ 1. The Spanish-British Convention. First let us consider the Spanish agreements. They all relate to the "treatment of companies." The earliest of these was signed at Madrid with Great Britain on June 27, 1924.[1] The term "companies" includes "joint stock companies and other associations engaged in commercial, industrial, transport, insurance, financial" or otherwise described business. The agreement is that each country's companies, transacting business in the territory of the other, shall not be subject to higher taxes of any sort than apply

[1] C. 345, pp. 112–14.

to domestically organized companies. The method of apportioning taxes between the two interested countries is fixed. If a British corporation engages in business in Spain, its Spanish tax cannot be at a higher rate than that applicable to the same sort of Spanish undertaking. Furthermore, it can be taxed only on "that part of its capital effectively employed" in Spain, if the tax is levied on capital. If the basis is the volume of business, then only "the business carried on or controlled within" Spain can be taxed by Spain. If the levy is on income or profits then only those "arising from business carried on or controlled within" Spain can be taxed by Spain. These principles are *vice versa* applicable to Spanish companies operating in Great Britain and Northern Ireland. There is also a special proviso for the computation of the Spansh tax on British banks and insurance companies operating in Spain, with a further agreement that the rate applicable to a Spanish branch of a British bank shall not exceed one fortieth of one per cent of its total nominal capital and reserves. An usual item to find in a double taxation treaty is found in this one—a specific provision that "In no case shall the treatment accorded by either contracting party to companies of the other be less favourable in respect of any matter whatever than that accorded to the companies of the most-favoured foreign country."

§ 2. **The Spanish-French Convention.** The Spanish treaty with France, signed May 18, 1926,[2] contains no such special rate provision as in the case of English banks. But French banks operating in Spain are freed from liability for the Spanish tax on profits derived from movable property. This treaty, moreover, includes "associated and branch establishments and agencies" when fixing the applicable proportions. Each national admin-

[2] Ibid., pp. 118–119.

istration shall tax only the proportion of income, profits, or capital within its own territorial jurisdiction. Each may demand balance sheets, profit and loss statements, and annual reports from the companies whose tax is to be determined. One set of rules applies for the determination of the proportion in the case of "general companies," another for banks, and still another for insurance companies. The rules concerning appeals are given in greater detail in the French than in the British Convention with Spain. The treaty with France, unlike the one with Great Britain, contains no statement relative to most-favoured nation treatment to be accorded companies of the contracting states.

Closely modelled after the French treaty is the Italian one with Spain, signed on November 28, 1927.[3]

§ 3. **The Franco-Belgian Establishment Convention.** The Establishment Convention between France and Belgium provides in its eighth article as follows:

> "As regards taxes calculated on capital, revenue or profits, each of the contracting parties shall only tax companies of the other party according to the nature of the tax, in respect of that part of the company's capital which is invested in its territory, the property which the company possesses therein, the bonds in circulation therein, the profits it derives therein, or on the business it transacts therein."

This agreement is applicable to companies, just as in the case of the Spanish treaties cited. It was signed October 6, 1927, and its ratification was noted in the *Moniteur Belge,* November 5, 1927, page 4949.

§ 4. **Certain German Agreements.** Germany was a party to all of the other special agreements on double

[3] 1929 Supplement, pp. 17–19.

taxation referred to in this Chapter. Two of them are provisional, and were signed, when they were, so as to give to the taxpayers of the countries involved, Poland, Denmark, and Germany, relief from the burden of double taxation while the consummation of permanent conventions was being planned. The date of the one with Poland,[4] was March 21, 1923, of that with Denmark,[5] February 14, 1928.

§ 5. **The Polish Arrangements.** The Polish Arrangement may be summarized as follows:

1. Income from landed estates and buildings, from industrial undertakings or from the exercise of a profession shall be subject to tax only by the state in which the estate and buildings are located or in which an establishment is maintained for carrying on the industry or profession in question.
2. If a business establishment exists in both countries each may tax the income arising therein.
3. Income from mortgages and mining shares shall continue to be subject to taxes provided under the national laws involved—until the definitive treaty is signed and in effect.
4. All other income shall be liable for income tax only in that state in which the taxpayer is domiciled. If the taxpayer is domiciled both in Poland and Germany, the tax shall be paid to the country of which he is a national. If he is a national of both and has a double domicile each state shall collect tax on one-half his income.
5. No deductions for taxes shall be made from wages of workers domiciled in one of the two contracting states and working in the other.

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[4] C. 345, pp. 106–107.
[5] Ibid., pp. 109–110.

§ 6. **The Danish Arrangements.** The Danish agreement merely directed the supreme financial administrative authorities of the two states to make special arrangements for the prevention of double taxation in the individual case of each state's own nationals. It also defined the arrangement as applicable to "the state and communal tax on income and the tax on property" in Denmark, and to "the tax on income and the tax on property" in Germany—levied after October 1, 1927.

§ 7. **The German Treaty with the U. S. S. R.** On October 12, 1925, Germany signed a treaty with the Union of Socialist Soviet Republics because the two countries were "desirous of strengthening their friendly relations and of establishing for that purpose a basis for practical co-operation in the economic sphere and in the sphere of international legal relations."[6] The fifth part of that convention contains the "Fiscal Agreement."

The first Article of the Fiscal Agreement provides for the same treatment and the same protection to the person, property, rights, and interests of nationals of the other state as nationals of the country or of the most favored nation. It declares that a company duly organized under German or Soviet law shall be deemed a national of Germany or of the U. S. S. R. It adds that an undertaking in which the state participates shall be treated as a company of that state.

The second Article sets forth that the equality of treatment referred to in the first Article extends to the taxation of nationals of the one party engaged "in the territory of the other party in agriculture, including viticulture and fruit growing, the exploitation of forests, fishing, stock breeding, trade and industry, mining or

[6] Ibid., pp. 115–117.

commerce." The earlier paragraph has enumerated "trade, industry, business, profession and occupations."

Double taxation is specifically prevented by treating immovable property and mortgages thereon, and all income therefrom, as subject to tax only in the state wherein the landed property is situated, and by restricting the taxation of business to the state wherein the business has a permanent establishment. The usual definition of a business establishment follows in the treaty which then provides, as usual, that if an establishment exists in both states, each may tax it only on profits arising within its territory.

"Participation in undertakings in the nature of companies" is treated as carrying on a trade or business. Whether this means that share ownership is so treated or whether this provision applies to partnerships is not clear from the text. If the latter, it is in harmony with rules laid down in nearly all the treaties. If the former, it presents a new principle for prevention of double taxation.

The third Article contains a novel proposition. It is that the taxpayer is "entitled to demand that his taxes be calculated according to the general rules" if he is not satisfied with a lump sum tax decided on by the Central authorities in lieu of the miscellaneous taxes assessed by the Reich or Union, States or Soviet Republics, communes or other political units.

When the treaty was signed a protocol was added which is significant in one important respect. It specifically provides:

> "The most-favoured-nation treatment provided for in Article I shall not apply to the advantages which one of the contracting parties has granted or may hereafter grant to another state in treaties the object of which is to adjust domestic and for-

> eign taxation, and in particular to prevent double taxation, or to grant legal protection and assistance in fiscal matters and in penal fiscal cases."

Here is the first clear cut definite statement in any of this group of treaties that the most-favored-nation treatment shall *not* apply. That principle is important.

§ 8. **The German-Swiss Convention.** The German Convention with Switzerland,[7] like the Austrian one with Switzerland, provides that no distinction is to be made in the taxation of earned income from public or private corporations, that all such earnings (salaries, wages, pensions, and professional income) "shall only be subject to income tax in the state in which the taxpayer is domiciled." There are the usual rules concerning double domicile and the definition of domicile. There is added, however, a statement relative to husbands, wives, and minor children, not found in other treaties. It is that:

> "The domicile of a husband shall be regarded as the domicile of his wife except in cases in which the latter is entitled, under the provisions of her national legislation, to establish her own domicile, and has in fact established such a domicile. Children who are minors shall be deemed to possess the domicile of the person under whose parental authority they are placed; and wards the domicile of their legal representative."

Like the provision in the German-Danish temporary agreement, the German-Swiss Convention states that direct negotiations shall be "entered into in each individual case as it arises" by the chief authorities of the Reich with those of the Canton concerned (for the Swiss Confederation in this case was acting on behalf of seven

[7] Ibid., pp. 138–139.

Cantons) for the purpose of apportioning taxation claims.

There are numerous special arrangements concerning railway employees working in the state of which they are not nationals. Then in the protocol there is a guarantee by Germany to pay at least 38,000 Swiss francs per annum to Basle Town as a compensation for the loss in taxation it must otherwise sustain under the agreement. One of the specifically enumerated taxes affected by the agreement is the "fire brigade tax," a new subject for a tax treaty.

§ 9. **German-Danzig Agreements.** The German-Danzig decrees of November 19 and 22, 1923,[8] contain the usual provisions as to the taxation of the income from immovable property, from business establishments, from professional activity exercised from a fixed center, or salaries or allowances paid from public funds. They apply to natural and juridical persons. Article 4 sets forth that in the case of dual domicile the taxes due are to be prorated between Germany and Danzig on the basis of nationality as in certain other treaties. The decrees contain no provision relating to the taxation of income from transferable securities, but they do state positively that they do not apply to the taxation of directors' fees.

Nearly three years later (July 29, 1926) another Decree was approved[9] which added first that German or Danzig nationals resident in Danzig are to be free of liability for German taxes in respect of "income derived by them from shares in limited liability companies which have their head office or centre of management in the German Reich; and income derived by them from participation, as sleeping partner, in a commercial under-

[8] Ibid., pp. 163 and 166.
[9] Ibid., p. 165.

taking, if the undertaking has its head office or centre of management in the German Reich," and, second, that such nationals resident in Germany, are to be free from liability to Danzig taxes which would otherwise be due on income derived from a company whose head office is in Danzig.

§ 10. **The German-Saar Agreement.** On July 13, 1921, the President of the Governing Commission of the Saar Territory, signed a decree for the abolition of double taxation in the Saar Territory and Germany, to be effective retroactively to April 1, 1920, on condition of reciprocal acceptance by Germany.[10] It was so accepted by the German Minister of Finance on October 11, 1921.[11] The agreement contains the usual provisions concerning taxation of income from realty and from commercial undertakings, but it contained exemptions from double taxation of income of no other classifications.

This ends the list of existing international agreements as to the tax on income now in force. These ten bilateral declarations are important as helps toward the solution of the problem but none of them is a complete tax treaty.

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[10] Ibid., p. 176.
[11] Ibid., pp. 177–178.

CHAPTER X

NATIONAL LEGISLATION TO PREVENT DOUBLE TAXATION

§ 1. Australian Commonwealth.
§ 2. Austria.
§ 3. Belgium.
§ 4. Canada.
§ 5. China.
§ 6. Denmark.
§ 7. Finland.
§ 8. France.
§ 9. Germany.
§ 10. Great Britain and Northern Ireland.
§ 11. Hungary.
§ 12. Italy.
§ 13. Japan.
§ 14. Mexico.
§ 15. The Netherlands.
§ 16. Norway.
§ 17. Poland.
§ 18. Roumania.
§ 19. South Africa.
§ 20. Spain.
§ 21. Sweden.
§ 22. Switzerland.
§ 23. Union of Socialistic Soviet Republics.
§ 24. United States of America.

Some provisions of national law are expressly designed to prevent, others to minimize, double taxation. Certain of these are based on reciprocity, others are conditional. Thus far we have not discussed either of these groups. In this chapter there will be a mention of both types of tax-relief provisions. The statements under the names of the various countries are not intended to furnish a complete account of how any nation attempts to

prevent double taxation. They are rather intended merely to give an idea of the trend of such legislation. In some cases the remarks will be limited to a statement of how foreign income is taxed or what differences exist in taxes levied because of the origin of the income or of the residence or nationality of its recipients.

§ 1. **Australian Commonwealth.** The Australian tax law (Income Tax Assessment Act 1922–1927) grants only one concession in the case of income subject to international taxation.[1] That is a reduction in the rate of tax if the taxpayer is subject to both British and Commonwealth taxes or British, Commonwealth and Australian state or territorial income taxes. The simplest cases are those (1) where the Commonwealth rate is greater than the British rate, in which case the rebate is one-half of the British rate and (2) where the Commonwealth rate is not greater than the British rate, in which case the rate of rebate is the excess of the Commonwealth rate over one-half of the British rate. If, however, state income taxes are involved, the formula becomes exceedingly complicated. The full text is found in section 18 of the Act mentioned above.

§ 2. **Austria.** Austria classifies the principal forms of business enterprise as a partnership *(offene Handelsgesellschaft)*, limited partnership *(Kommanditgesellschaft)*, general corporation *(Aktiengesellschaft)*, close corporation *(Gesellschaft mit beschränkter Haftung)*, and the Austrian branch of a foreign corporation.[2]

Partners resident or nonresident are taxable on their Austrian profits, but in the case of shareholders a difference in fiscal treatment is to be noted. Residents are

[1] C. 345, pp. 182, 183.
[2] Commerce Reports, Aug. 16, 1926, pp. 434–436.

taxable on dividends, as are also nonresidents, as to their dividends from a close corporation *(G. m. b. H.)*. A nonresident owner of stock of a general corporation *(Aktiengesellschaft)* is not required to pay any tax on dividends thereon.

The Austrian branch of a foreign corporation is taxable on its Austrian profits only (after payment of registration dues) but it is required to submit general balance sheets, as well as branch-office records, to Austrian officials.

By virtue of the law of February 6, 1919, on the Duties on Voluntary Assignments of Property, the "Secretary of State for Finance may direct that measures be taken which are not in accordance" with other terms of the law. This privilege is limited, however, to cases where reciprocity is observed.

If an Austrian business extends its operations abroad it is theoretically subject to taxation on all its profits. It is provided in the Personal Tax Act of 1924, however, that if an enterprise has a permanent establishment beyond Austrian territorial limits, the business profits there earned will not be subject to Austrian Tax, if that undertaking can show that it is required to pay a similar tax to the country where the foreign branch is established and that the country in question observes reciprocity in such matters. It is always held, however, that at least one-quarter of the total of such profits are subject to Austrian tax.

The same law exempts individual residents of Austria from tax on income from real property situated abroad, on profits on business regularly conducted abroad, and on salaries or other remuneration paid by some other government—all on condition that reciprocity is observed. Those Austrians who hold positions under the Austrian Federal Government but who are stationed

abroad are exempted from tax on such salaries if the state to which they are officially assigned taxes such salaries. If it does not do so, then Austria does.

§ 3. **Belgium.** Reference has already been made on pages 11–12, in outlining certain pre-war legislation, to the Belgian principle of taxing certain foreign-earned income at one-quarter the regular rate. This provision of law has been continued down to the present.[3] This tax *(taxe professionnelle)* is assessed at a progressive rate varying from 2 to 10 per cent, with the provinces and communes adding their own rates to as much as 7½ per cent. It is this tax which in the case of certain foreign income is taxed at one-fourth the usual rate. This concession is made only on the filing of a proper declaration.[4]

Since 1924 an agent of a foreign firm or any other person not a permanent resident of Belgium has not been liable for surtax but must pay a minimum rate of 60 francs per annum previous to beginning work. Under certain conditions an additional amount may be charged.[4]

§ 4. **Canada.** Canada's income tax on individuals (both the normal tax and the surtax) is due from persons ordinarily resident in Canada on their total income, from persons resident 183 days in one year on total income, and from nonresidents "doing business in Canada" on their Canadian profits.[5]

Corporations organized under Canadian law must pay corporations income tax unless they are "doing business" exclusively outside of Canada. Foreign corporations pay that tax only on their profits resulting from "doing business" in Canada.

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[3] F. 212, p. 11.
[4] Commerce Reports, April 5, 1926, pp. 17–20.
[5] C. L. 112, Nov. 20, 1925, pp. 4–5.

The law itself defines at great length what is meant by "doing business" and in this respect differs from the British principle which has left all such decisions to the courts.

In special circular No. 112, Division of Commercial Laws, Department of Commerce, dated November 20, 1925, the following appears:

> "What constitutes carrying on business in Canada is further defined in the provisions which declare that persons residing or having their head office or principal place of business outside Canada, but carrying on business in Canada, either directly or through or in the name of any person, are liable in respect of the net profit arising from business in Canada, and that where a nonresident person in whole or in part produces, grows, mines, creates, manufactures, fabricates, improves, packs, preserves, or constructs anything within Canada and exports the same without sale prior to the export thereof, he shall be deemed to be carrying on business in Canada and to earn within Canada a proportional part of any profit ultimately derived from the sale thereof outside of Canada. The Minister of Finance has full discretion as to the manner of determining such proportionate part.
>
> "The Canadian income tax law even covers the soliciting of orders by the traveling salesman of a foreign merchant, which act is not specifically envisaged in the income tax legislation of most countries. Any nonresident soliciting orders or offering anything for sale in Canada through an agent or employee, and whether any contract or transaction which may result therefrom is completed within or without Canada, or partly within and partly without Canada, or any nonresident who lets or leases anything used in Canada, or

> who receives a royalty or other similar payment for anything used or sold in Canada, is deemed to be carrying on business in Canada and to earn a proportionate part of the income so derived in that country. The Minister of Finance has in these cases as well, full discretion as to the manner of determining such proportionate part."

Relief from double taxation is effected by granting credit unconditionally on account of income tax paid to Great Britain, or any other self-governing British dominion or colony. Similarly relief is granted in the case of any income tax payment to any country on condition of reciprocity but not to an extent greater than the Canadian tax on such income. This is substantially the same as the American provision.

§ 5. **China.** Although China's civilization is old, it is a new country so far as modern life is concerned. Yet she is bound by treaties made three-quarters of a century ago under conditions which no longer obtain. She has urgently called for their revision, but so far has met with but little success. So far as double taxation is concerned, therefore, she is placed in an unusual position. By these treaties the foreign capital invested in China, instead of being subjected to double taxation is not taxed by China at all and is usually exempt from tax by the Government of the country whence it came. The Chinese Government has, at this time, decided to inaugurate a system of taxation which includes the right of its Treasury to inspect the records of the numerous foreign banks established on Chinese territory.

§ 6. **Denmark.** The general principles of the Danish tax on income are four in number. First, all resident Danish nationals are taxable on their total income. Sec-

ond, all foreigners resident in Denmark for six months consecutively are taxable on their total income. Third, all nonresidents are taxable on their income only from Danish sources. Fourth, corporations are granted a proportional allowance for income earned abroad or for capital invested abroad.[6]

The Law of April 10, 1922, provides in Article 50, "where persons, companies or institutions taxable in virtue of the present law are likewise subject to tax in another state in respect of the same income or capital, the government may grant exemption from such tax with a view to avoiding double taxation."[7]

The Act of two years later (No. 73, March 29, 1924) authorizes the government, with a view to avoiding either wholly or in part double taxation due to communal taxes within and without Denmark "to allow, by means of a convention concluded with the foreign state on a basis of reciprocity, modifications of the obligations to pay the communal taxes."[8]

§ 7. **Finland.** Finland's law No. 306, dated December 5, 1924, concerning tax on income and property provides in Paragraph 3 of Chapter 1, as follows:[9]

> "The government shall be entitled, subject to reciprocity, to grant exemptions from the stipulations of the present law, relative to liability to taxation in respect of income derived from and property situated abroad, as well as the liability to taxation of foreigners and foreign states, associations, establishments or institutions."

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[6] Brochure 11, p. 20.
[7] C. 345, p. 184.
[8] Ibid., p. 151.
[9] Ibid., p. 152.

§ 8. **France.** The French system of income taxes[10] has three important divisions. First, there are the various *impôts cédulaires,* applicable to items of income whether of individuals or of corporations. These are in nearly all cases impersonal; only with professional income, salaries, pensions, and annuities, does any personal factor enter. Declarations are required under these schedules and in assessing industrial and commercial profits. Even here, it will be seen, there is likely to be confusion in terms, for this use of the word "personal" differs from its use in the draft of the experts. It is here (in the case of certain French taxes) used to convey the idea that personal factors enter into the computation of the tax which, in the case of pure *impôts réels,* would be lacking, for, in the cases mentioned, a declaration from the recipient of income is required. This is not the case with other *impôts cédulaires.*[11]

The second division is concerned with the surtax *(impôt global sur le revenu).* This is assessed at graduated rates varying from 1.2 per cent to 30 per cent on the entire income of French citizens. The tax takes into account all the factors ordinarily found in determining personal taxes—and many not usually found—marital status, number of years married, age if not married, number of children, number of dependents over 70 years of age, number of infirm dependents, size of income, and location of permanent residence. The lowest exemption is granted in the purely rural districts, the next higher in the smaller villages and towns, and the greatest in the large cities.

Foreigners resident in France are subject to surtax on either seven times the rental value of their residence or on their income from French sources, whichever is the

[10] Commerce Reports, March 1, 1926, pp. 512–513.
[11] Brochure 11, pp. 9–16.

larger.[12] A foreigner is considered a resident if he owns real estate in France or has a lease on real estate for a period including December 31, any year.

The third item in the French system of income taxes is the corporation *(société anonyme)* tax. There is an organization tax equal to 3 per cent of net assets and miscellaneous stamp taxes on securities and transfer taxes on sales of securities. These are in addition to the *impôts cédulaires* which may be due from a corporation under the first heading of French income taxes.

§ 9. **Germany.** The income tax *(Einkommensteuer)* is applicable to individuals, the corporation tax (*Körperschaftsteuer*) to corporations. Individual residents of Germany are liable for tax on their income from all sources, nonresidents only on their German income.[13] The rates are graduated between 10 and 40 per cent. There is a tax of 10 per cent withheld at the source on dividends and interest—the only tax liability of nonresidents on income from these sources. Residents are allowed full credit for taxes withheld at the source on items of their income. German nationals abroad on business may apply taxes on their income paid to a foreign state against their German income tax to such an extent as is permitted by a decree of the Minister of Finance.[14] This privilege extends to corporations as well as individuals.

The corporation tax rate is 20 per cent. It applies to the net income of all corporations having their seat within Germany and, in the case of foreign corporations, to their German income.

Interest on foreign loans and foreign bond issues may be exempted from the ten per cent tax by the Finance

[12] Act of July 15, 1914, Art. 11.
[13] T. I. B. 523, p. 14.
[14] C. 345, p. 184.

Ministry. The borrower may assume the tax and so pay the interest tax-free so far as its recipients are concerned.

The German Minister of Finance, with the consent of the Reichsrat, may assess the nationals or companies of a foreign country at a higher rate of tax if German subjects or German companies in that country are not taxed on the same basis as its own citizens and companies or those of a most-favored nation.

To encourage immigration of individuals and of groups, two laws were enacted on August 10, 1925, the one granting special relief from the property tax, the other from income tax. This latter provision is as follows:[15]

> "In the case of taxpayers who become fully liable to taxation as a result of immigration from abroad, the Finance Minister of the Reich may direct that in individual cases, or particular groups of cases, income of a particular kind, and especially income derived from abroad, should be wholly or partly exempted for a period of five years after full liability to taxation has been incurred, or that such persons should be taxed in proportion to their expenditure in Germany; the Finance Minister of the Reich or the provincial Finance Office appointed by him may in such cases fix the income tax at a lump sum in agreement with the taxpayer."

§ 10. **Great Britain and Northern Ireland.** A resident of Great Britain or Northern Ireland is liable for income tax (including surtax) on his total income from all sources whether earned in the British Isles or elsewhere,[16] but as in the American law there is no definition

[15] Ibid., p. 185.

[16] Brochure 12, especially pp. 9–13, and T. I. B. 523, p. 13.

in a British Finance Act of who is a resident. This determination has been left to the courts. Their tendency has been to hold Britishers liable to the tax whenever there has been the slightest excuse for doing so, based on any of the factors in the cases arising. They have tended to exempt any other person claiming to be a nonresident who could prove he had no intention of establishing himself permanently in Great Britain and Northern Ireland, that his presence there was purely temporary, and that in one fiscal year he was not actually residing there as much as six months.

A nonresident, irrespective of his nationality, is subject to no British tax whatever on any foreign income he receives. In so far as income from British sources is concerned he is subject to the same tax as a resident, but he is entitled also to all the deductions a resident taxpayer may properly claim.

In the case of corporation taxation, a different set of terms is used from those found under American law. There is no such distinction as domestic and foreign corporations or associations. Rather the deciding point is, "Where is the head and seat and directing power" of the enterprise? If it is determined that the head or seat or directing power is, for example, in London, then the corporation is liable for British tax on its total income even including that received from its subsidiaries, separately incorporated and deriving their income from non-British sources. Just what "directing power" means is ever a moot question. Special provisions for the taxation of *bona fide* brokers, regularly employed by foreign merchants, have been found in Finance Acts since 1925. Such agents or brokers are no longer chargeable for income tax on profits arising out of such sales. Corporations are taxed on the income deemed available for distribution.

The two essential tests as to liability to British income tax may be summarized as follows: First, all annual income, whether from property in Great Britain or Northern Ireland or from business or profession carried on therein, is liable to income tax, no matter where the person resides to whom the income accrues. Second, all annual income accruing to a person residing in Great Britain or Northern Ireland is, in general, liable to income tax, no matter what or where its source may be.

One's residence is not where a person is domiciled, nor necessarily where he has a habitation, but where he is held to reside. Under this complicated concept, the British and other governments can easily decide that a person may reside in two or more countries at the same time.

The great problem in taxation of business profits construed by the taxpayer to arise from without the limits of Britain centers in the conflict between doing business in Great Britain and with Great Britain. If the activity is truly held to be that of doing business only *with* Great Britain (or Northern Ireland) no tax liability attaches to the foreigner. If the business is in Great Britain, its profits are taxable.

Individuals are subject to normal tax and surtax (until 1928 called super-tax). Normal tax rates are now 4s. 6d. in the pound sterling or 22½ per cent as against 30 per cent at the end of the war period and 20 per cent for the fiscal year 1929. Abatements in rate of tax are allowed on certain very small incomes. Therein marital status is not so much the determining factor as that of dependents. Surtax rates begin at £2,000 and are graduated.

Corporations are taxed on the income deemed available for distribution. In British practice it is unimportant under the laws of what nation a company has

been incorporated. If the directing power is in Britain (or Northern Ireland), a company is subject to tax. Resident corporations, according to Konstam, are taxable even on the profits of subsidiary companies in foreign countries.[17]

The British law allows a credit against its tax on account of taxes paid to self-governing British dominions and colonies, by an adjustment in the rate charged.

§ 11. **Hungary.** In theory at least, under Hungarian law the tax burden of a foreigner in Hungary and of a citizen are the same. In practice, however, there may be inequalities between the tax rates of domestic corporations and those of the Hungarian branch of a foreign corporation.[18] The reason is that the rate of tax is based upon the ratio between income and capital, and the "capital" of a domestic branch is not that actually in use in Hungary but that which is determined by the use of a formula based on turnover. Since the ratio within and without Hungary may not be the same (scarcely could be the same) there develops an actual inequality. The rates are, however, in no case prohibitive, as may be seen from the following structure of the Hungarian income tax system, which must be divided into eight parts.

First, there is a land tax based on a general cadastral survey in which the basis used is approximately one-fifth of the rental value and the rate is 25 per cent. In other words, the land tax averages 5 per cent of the income.

Second, there is a building tax at the rate of 24 per cent of the gross income.

Third, there is a tax on earned income. This includes general earnings at the rate of 5 per cent on the profits of individuals in business, or from a profession, or from

[17] See C. L. No. 1121, November 20, 1925, pp. 3–4.
[18] Commercial Reports, Sept. 6, 1926, pp. 620–621.

partnerships, while against the salaries of employees, there is assessed a progressive tax from 1 per cent to 7½ per cent on monthly salaries which is withheld and paid by the employer before the fifteenth day of the following month.

Fourth, there is the corporation tax which is levied on domestic corporations and on Hungarian branches of foreign companies. The rate varies between 16 per cent and 30 per cent in accordance with the ratio of income to capital.

Fifth, comes the income tax on individuals. Residents are taxed on their income from all sources, nonresidents on theirs from Hungarian sources. The rates range from one to forty per cent. This highest percentage is applicable to net income in excess of 1,000,000 gold crowns. Dividends are not taxable to nonresident shareholders.

Sixth, is the property tax so-called but which is really a supplemental tax on certain larger incomes which is assessed at progressive rates from 1/10 of 1 per cent to 1 per cent.

Seventh, there is the tax to aid war invalids. This must be paid by all individuals and corporations subject to direct taxation in Hungary; it is based on the total of such taxes already paid. This levy was scheduled to lapse after December 31, 1930.[19]

Eighth, there is a special tax on interest. The rate is 10 per cent in the case of bond interest. It is withheld at the source and may be deducted from the amount of interest paid. But interest on private commercial loans and on current accounts is tax exempt.

§ 12. **Italy.** The outstanding difference between the Italian and other continental systems of income taxation

[19] Whether it did so lapse the writer has not yet been able to learn.

lies in the treatment of dividends. The Italian Government imposes no tax on dividends paid on the stock of Italian corporations directly, though it does require residents of Italy (whether nationals or otherwise) to account for such dividends in arriving at their liability to surtax *(imposta complementare globale progressive sul reddito)*.[20] The rates of this complementary tax vary from 1 per cent to 10 per cent. The effective rate is on total income and not on brackets of income as in America. Moreover allowances are made according to one's marital status and the number of one's dependents. In this respect the Italian surtax is like the French and unlike the American. Returns are due by all persons, nationals and foreigners accounting for all their income having its origin in Italy or enjoyed there. This principle of taxing income where enjoyed, and of not requiring residents to pay surtax on total income if from foreign sources and not brought into the country where the resident is living, is distinctive of the Italian law.

By virtue of a decree dated November 16, 1922, a stimulus to the influx of foreign capital into Italy was given. The Minister of Finance was thereunder authorized to exempt from the tax on movable wealth (*ricchezza mobiliare*) interest on loans contracted and bonds issued abroad prior to December 31, 1928, by corporations, communes, provinces and other entities, except when such loans represented a refunding of debts already owed to foreigners.[21]

A little more than a year later, it was decreed that corporations having their seat in Italy might be exempted from tax on income earned by their branches or subsidiaries established in foreign countries, provided such income has been subject to taxation in the foreign

[20] Commerce Reports, November 29, 1926, p. 544.
[21] Ibid., p. 543.

country. Similarly, salaries and wages paid by such companies to their employees in such branches or subsidiaries who are permanently resident abroad were exempted by this same decree.[21]

Royal Decree No. 1463 of August 12, 1927, provided in Article 9 an exemption similar to the decree of December 13, 1923 already cited. This latter rule is as follows:[22]

> "As from January 1, 1928, no account shall be taken, in assessing movable property tax on the category B and category C (2) income of corporations and private firms having their headquarters in Italy and possessing branches outside the national territory, of the income earned abroad or of salaries and other allowances of all kinds paid abroad, so long as these corporations and firms continue to conduct the said branches on an independent footing, and produce to the Department of Taxes proper accounts corroborated by such further evidence as may be required to apportion, and discriminate between, the various sources of income.
>
> "The provisions of the above paragraph shall also apply to corporations and firms having branches in colonies which possess a system of taxation independent of that of the home country."

§ 13. **Japan.** The Income Tax Law of July 30, 1920, provides that resident individuals are taxable on their total income as are also domestic corporations, but that nonresident individuals and foreign corporations are subject to tax only on their Japanese income.[23] If a

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[21] Ibid., p. 543.
[22] Doc. C. 345, p. 196.
[23] C. L. No. 112, Nov. 20, 1925, p. 9.

domicile is maintained for one year, the individual becomes liable for tax if his income is sufficiently large.

§ 14. **Mexico.** Under the Mexican Income Tax Law of March 18, 1925, a Mexican wherever residing is subject to tax on his entire income even though earned abroad, while an alien, whether resident or not, is taxable on his income from Mexican sources or from profits on transactions consummated in that country.[24] These rules apply to corporations also. Mexican corporations are permitted to offset their tax to the national government by whatever they pay as income tax to a foreign government "for the same reasons."

§ 15. **The Netherlands.** Various steps have been taken by the Dutch Government looking to the reduction of double taxation, the most important of the earlier of these being ministerial decrees and the Acts of December 19, 1914, January 11, 1918, April 16, 1920, and July 7, 1920. Since 1920 came the road tax law of 1926 and the ministerial decree of April 7, 1928.[25] This decree is so important that it is printed here below in full.[26]

"Article 1.

"(1) When a Netherlands national resident within the Kingdom is subject to a tax on income or capital levied on behalf of a foreign state in respect of:

"Immovable property situated abroad;

"A claim secured by a mortgage upon immovable property situated abroad;

"A trade or profession practiced abroad;

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[24] Ibid., pp. 9, 10 and 1929 Supplement, p. 37.

[25] Commerce Reports, Oct. 25, 1926, p. 211, and C. 345, pp. 172 and 197.

[26] C. 345, p. 198.

"An appointment of which the emoluments are paid by a foreign public authority;

"A right to a pension or retaining fee on account of having held an appointment of which the emoluments were paid by a foreign public authority;

"(a) His tax, assessed on the basis of Articles 37 and 38 of the Income Tax Law of 1914 and on the basis of Article 3 of the National Defence Tax Law No. 11 shall be reduced by the amount of the tax, assessed on the same basis, leviable upon an income equal to that part of his income derived from the immovable property, mortgage, trade or profession, or periodical payment;

"(b) His tax, assessed on the basis of Article 10 of the Capital Tax Law of 1892 and on the basis of Article 3 of the National Defence Tax Law No. 1, shall be reduced by the amount of the tax assessed on the same basis, leviable upon a capital sum equal to that part of his capital consisting of the immovable property or right attaching thereto, or of the mortgage, or of the sum invested in the trade or profession; it being understood that the value of the right to a share in the profits of a trade or profession practised abroad shall be regarded as capital invested in that trade or profession.

"(2) When the taxpayer has debts which are secured by mortgage on his immovable property, the income from the immovable property shall be reduced, for the purpose of assessing the tax deduction, by the annual amount of the interest due, and the selling value shall be reduced by the cash value of the debts.

"(3) When the taxpayer has debts in direct connection with a trade or profession practiced abroad, the value of the assets invested in that trade or profession shall, for the purpose of

assessing the tax deduction, be reduced by the cash value of the debts.

"(4) When immovable property is situated partly within the Kingdom and partly abroad, the part situated abroad shall be regarded as separate property.

"When a trade or profession is practiced both within the Kingdom and abroad, such trade or profession shall, in so far as concerns its practice abroad, be regarded as a separate trade or profession.

"(5) When the taxpayer comes under paragraph (1) by reason of several sources of income, the parts of his income referred to under (a) and those referred to under (b) shall be taken jointly as the bases for assessment of the tax."

"Article 2.

"These measures shall also apply to foreigners resident in the Kingdom who:

"(a) Have resided within the Kingdom for the last five fiscal years preceding the fiscal year in question, or

"(b) Are nationals of a state which grants to Netherlands nationals resident in its territory exemption from double taxation on equal or analogous conditions.

"Exemption from double taxation is granted in virtue of the foregoing Article 2(b) to foreigners resident within the Kingdom who are nationals of Canada, the United States of America, the Union of South Africa, and Austria."

To illustrate the meaning of Article 1, section 1(a), let us assume that the total income is 500,000 florins, and the income from foreign sources is 50,000 florins. The tax to be paid would be neither the tax on 450,000 florins nor nine-tenths of the tax on 500,000 florins, but rather the

total tax on 500,000 florins less the tax that would be due if the taxpayer's total income were 50,000 florins. The meaning of Article 1, section 1(b) is similar, except that it is applied to capital rather than income.

§ 16. **Norway.** Reference has already been made to the Norwegian Fiscal Law of August 18, 1911, which is still in force.[27]

§ 17. **Poland.** In order to facilitate the free circulation of capital into, and consequently the economic development of, Poland, a debtor country, it exempted, under the law of July 20, 1925, from the tax on capital and income the income from capital belonging to natural or legal persons domiciled abroad. The applicable sections of law read as follows:[28]

> "The incomes of physical persons derived from immovable property and permanent establishments situated outside the republic and also directors' fees, salaries and pension funds derived from a foreign country or from foreign municipalities, as also other public funds of the same nature shall be exempt from income tax if it is proved that they are subject to a similar tax in the other country and provided the said country accords reciprocity.
>
> "In order to avoid double taxation or to accord reciprocity, and also in order to issue decrees to meet the case of measures taken by a foreign country, the President of the Republic has the right, on a proposal of the Minister of Finance submitted by the Cabinet, to conclude agreements based on principles different from those mentioned in the law and to publish decrees relating thereto."

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[27] Above, p. 12.

[28] 1929 Supplement, p. 35.

§ 18. **Roumania.** Roumania, like the United States and Mexico, holds all its nationals subject to its income tax law and taxable on their total income wherever earned. Relevant provisions of the law of 1923 read as follows:[29]

> "1. Every person inhabiting Roumania or habitually resident in Roumania for more than six months each year and all Roumanian subjects living abroad shall be liable to the general income tax on all their income accruing either in Roumania or in a foreign country.
>
> "When, however, a foreigner resident in Roumania is liable in another country to a graduated tax on his total income, similar to the tax introduced under the present law, he may, pending an agreement between his country and Roumania, request that his income taxable abroad be taxed in Roumania only to the extent of the difference between the Roumanian tax and the foreign tax in question.
>
> "2. Every foreigner who is neither domiciled nor habitually resident in Roumania shall be liable on all his income derived from Roumania."

Under the law of 1926,[29] an additional provision to prevent double taxation was added whereby a foreign person (individual or corporate) would not be liable to graduated tax on total income, if this income is subject to similar taxation in the recipient's own country and if the recipient is neither domiciled, nor habitually resident, nor possessing business headquarters in Roumania.

§ 19. **South Africa.** South Africa being a small country in need of population and capital has adjusted her taxation schemes to encourage the immigration of per-

[29] C. 345, p. 175.

sons and capital thereto. She taxes only such income as is derived from sources within her own borders. It is treated, however, as the personal income of its recipients and personal allowances are made. Nonresidents are, moreover, exempted from taxation on the income they receive from capital invested in South Africa.[30]

§ 20. **Spain.** In addition to certain stamp taxes, mostly on documents, and a tax on real property, which, under certain circumstances, is considered a schedular income tax, Spain imposes what we should call an income tax under three main divisions.[31] The first of these is the tax on industrial and commercial activity *(contribucion industrial)* applicable to all individuals, partnerships, and corporations engaged in industry or commerce, capitalized at 500,000 pesetas or less. Hereunder are assessed licenses (*patente*) for certain kinds of business and special rates for about 400 kinds of businesses. In addition, there is collected a 5 per cent surcharge for the expense of paying governmental salaries.

The second principal division of the income tax is that on income from work, capital, and work and capital combined *(utilidades)*. Here we find the *impôts cédulaires* assessed. The rate is 5 per cent on professional income, 15 per cent on directors' fees. The managers of the domestic branch of a foreign corporation are taxed 15 per cent, while the managers of a domestic corporation are taxed at the rate applicable to employees, which is between 2.8 per cent and 10 per cent. These taxes are collected at the source. Here we noted progressive taxation introduced into *cédulaire* taxation. Dividends are also taxed at the source and at rates varying between 5½ and 17¼ per cent, based on the ratio between income

[30] C. 495, p. 8.
[31] Commerce Reports, April 26, 1926, pp. 210–213.

and capital. Also under this main division corporation *(sociedad anonima)* taxes are assessed at rates between 6 and 15 per cent, according to the ratio between profits and capital.

Mr. Mitchell B. Carroll correctly says that the tax of a foreign company's Spanish branch is based on the ratio between its Spanish profits and its capital employed in Spain. Prof. Flores de Lemus, the Spanish Government's expert at the General Meeting in Geneva, 1928, pointed out, however, that in the case of a great disparity between invested capital and borrowed capital of a Spanish branch, the Spanish Government reserves the right not to allow a deduction for interest paid in arriving at the branch's net income.[32]

A domestic corporation with 500,001 or more pesetas capital may deduct its *contribucion industrial* from the amount it would otherwise owe as a corporation taxed as a *utilidad*. In no case can the domestic corporation's tax under this allowance be less than at the rate of 3 mills on the capital.

Spain imposes no tax on salaries earned abroad, if reciprocity is observed with Spain by the government of the other country.

The third main division of the Spanish income tax is the personal tax—what we should call a surtax. It is assessed against all residents on their total income, Spanish and foreign. This is in addition to the previously enumerated *impôts cédulaires* on individuals.

§ 21. **Sweden.** Direct taxation in Sweden[33] consists of the general national taxation of income and capital, and direct local taxes (1) on the assessed value of real estate, (2) on income except from real property (with-

[32] Commerce Reports, April 26, 1926, and P. V. 9, p. 5.
[33] Brochure 11, pp. 29–31.

out graduation), and (3) on income and capital (similar to national legislation) at progressive rates.

Under the national tax scheme we find a corporation tax on income in its relation to invested capital at graduated rates up to twelve per cent.

The general income tax on individuals has certain features we have not seen in the laws of other nations. For instance, under the subject of liability to tax, we find that:

A. Registered Swedish citizens are taxable on all their income and capital;

B. Non-registered Swedish citizens are taxable on income derived from Swedish sources and from capital invested in Sweden;

C. Nonresident foreigners are taxable on income from real estate in Sweden, on income from business carried on in Sweden, on salary or pension paid from Sweden, on dividends on Swedish stocks and on capital invested in Sweden, except in bonds or as deposits in banks;

D. Registered resident foreigners (not students) are taxable on foreign income used in Sweden plus all items just mentioned under C. above;

E. Registered resident foreign students are not subject to tax.

The deductions allowed from gross income are the necessary expenses in securing income which is subject to tax (but no living expenses), local taxes, interest paid, losses in business, periodic relief payments, and insurance premiums up to 200 Kroner paid to Swedish citizens.

Exemptions are allowed only to Swedish citizens. These are dependent on marital status, location of residence, and the number of minor children.

The concept "taxable income" is arrived at by subtracting the deductions and exemptions from the gross income and then adding one-sixtieth of one's net worth with household furnishings excluded.

The basic rate is graduated from 3 to 12 per cent and is annually adjusted according to budgetary needs.

§ 22. **Switzerland.** Switzerland has a war income tax still in effect which it scheduled to lapse after 1932. Then will cease all national direct taxation.

Since the Confederation has authority to enter into treaties on behalf of member Cantons, it follows that those arrangements would not be exactly equivalent to the usual double-taxation treaties, for they would apply only over a part of Switzerland.

If we take the Canton of Geneva, for an illustration, we can see certain aspects of how it taxes its citizens and visitors differently. Geneva has its own income tax. It applies to all Genevese residents, except two groups. Diplomats, consuls, and all properly accredited League officials and employees are exempt. In addition, visitors are permitted to remain without being subject to tax until they have lived out the calendar year of their arrival and one full year more, that is, unless they are gainfully employed. They are taxed on an estimated income equal to five times the annual rent they pay for the apartment, house, or villa they occupy. A foreigner ceases to be a visitor if during this otherwise exempt period he purchases a residence and lives in it.

§ 23. **Union of Socialistic Soviet Republics.** The following statement constitutes the first paragraph of the "General Views of the U. S. S. R. Government on the Problem of Double Taxation," distributed on October 22, 1928, as D. T. 133,[34] for the benefit of the General Meeting

[34] For explanation of "D. T.," see footnote on page 229.

of Government Experts on Double Taxation and Tax Evasion:

> "The present fiscal laws of the Union of Socialistic Soviet Republics to a very large extent eliminate the double taxation of foreigners living in the territory of the Union, and of foreign enterprises established therein. This result has been brought about by applying the principle that only property, enterprises and other sources of income situated in the territory of the Union are to be taxed. The only exceptions to this principle apply to certain Soviet organizations whose sources of income are situated abroad, but of these there are very few."

§ 24. United States of America. The attitude of the United States Government toward the question of double taxation is discussed in Chapter XIV hereof.

CHAPTER XI

DRAFT CONVENTION I-A

§ 1. The Four Economists.
§ 2. The Technical Experts.
§ 3. The Adams Plan.
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§ 67. Commentary on Article 14.
§ 68. Concluding Remarks.

§ 1. The Four Economists. The four economists appointed by the League to study the question of double taxation in all its theoretical aspects and to report thereon were from Great Britain, The Netherlands, the United States and Italy. While they studied the question as scholars and not as representatives of their own nations, the fact remains that three of them were from creditor countries, and those three actually wrote the report with whose findings Senator Einaudi agreed.[1]

[1] E. F. S. 73, p. 3.

§ 2. **The Technical Experts.** Then the League asked certain European countries to name technical experts to study this same question from the standpoint of practical administration and in the light of the report of the economists. Of the seven appointees, five were from debtor countries and two from creditor countries. In 1926–27 this committee was enlarged by the inclusion of representatives from Germany, Poland, Argentina, Venezuela, the United States and Japan. Thus the committee became more nearly world-wide in its composition, for now it included members from the two Americas and Asia, as well as an enlarged European group. At its London session it adopted a report, as has been previously mentioned (p. 66) in which was included a model draft bilateral convention for the prevention of double income taxation, and a commentary thereto, as well as certain other draft conventions with which we are here not concerned. That committee had carefully considered the plan proposed by Professor T. S. Adams, but it did not formally approve it as an alternative draft convention.

§ 3. **The Adams Plan.** The essential difference between the two centered in the fact that the Adams plan did not take into account the distinction between personal and impersonal taxes, while the committee plan did so distinguish. In the Adams plan the distinction was made between "origin taxes,"—"those imposed by the state on income derived by nonresidents from sources within its territory," and "residence taxes,"—"those imposed by the state on residents in respect to their income from both internal and external sources."[2]

§ 4. **The General Meeting.** It was apparent, therefore, before the General Meeting of Government Experts

[2] T. I. B. 523, p. 16.

convened at Geneva in October, 1928, that a definite and important difference in point of view existed between the representatives of countries having varying systems of income taxation. It was quite natural, therefore, that the General Meeting should adopt at the outset of its deliberations such a resolution as the following one, at the same time that it was felt that perhaps more than one model would become necessary:[3]

> "The Meeting, which is attended by the representatives of twenty-seven countries, notes that, as regards their main principles, the model draft conventions prepared by the technical experts constitute a useful basis of discussion for the preparation of model texts whose object shall be to prevent double taxation and tax evasion."

§ 5. **The General Meeting—Attendance.** The 27 countries were Austria, Belgium, Bulgaria, China, Czechoslovakia, Danzig, Denmark, Estonia, France, Germany, Great Britain, Greece, Hungary, Irish Free State, Italy, Japan, Latvia, Netherlands, Norway, Poland, Roumania, South Africa, Spain, Sweden, Switzerland, Union of Socialist Soviet Republics, and the United States of America. In addition the International Chamber of Commerce sent a delegation of six members who sat in an advisory capacity. In examining this list we find present no South American representatives as at London the previous year, but the addition of a delegate from South Africa and another from the Soviet Union is worthy of note.

§ 6. **The General Meeting—Extent of Work.** The General Meeting lasted from October 22 to 31, 1928, both dates inclusive. There were 17 sessions. In addition to

[3] C. 562, p. 5.

32 double-taxation mimeographed documents wherein were outlined plans proposed by the various delegates, and related matters, the official minutes, later distributed to the delegates, in mimeographed form, covered 248 legal-size pages. While it is true that estate taxation and fiscal evasion were discussed, income taxation was the principal consideration of the experts. The first 12 sessions were devoted to that subject, as were also the first half of the thirteenth, and almost the whole of the fifteenth, sixteenth and seventeenth. Plans for the future study of double taxation, again centering almost exclusively in income tax matters, were discussed in the fourteenth and fifteenth sessions.

As indicative of the extent of the interest in double income taxation, it may be mentioned that the representatives of 23 nations spoke on that subject alone, the Estonian, Greek, Hungarian and Roumanian delegates being the only ones not to take an active part in those deliberations. Without counting speeches on succession duties, administrative assistance in the matters of taxation, and assistance in the collection of taxes, Dr. Egger (Austria) spoke nine times; Dr. Dorn (Germany), Dr. Damsté (Netherlands), Dr. Lange (Norway), Professor Zaleski (Poland), and Mr. Corbett (South Africa) spoke between ten and nineteen times each; M. Borduge (France), Dr. Bolaffi (Italy), M. Blau (Switzerland), and Dr. Liubimov (U. S. S. R.) between twenty and twenty-nine times each; while Dr. Bainoff (Bulgaria), Sir Percy Thompson (Great Britain), Professor Flores de Lemus (Spain), and Dr. Adams (U. S. A.) spoke at least thirty times. Fourteen addresses were made by the invited representatives of the International Chamber. The chairman of the General Meeting was M. Clavier, Director General of Direct Taxation in the Belgian Ministry of Finance.

Inasmuch as the General Meeting herein discussed was the most important thus far held in the history of the movement to prevent double taxation of income internationality, and since the discussion makes an invaluable commentary on many phases of the subject, the arguments of the experts on moot points may profitably be included in this chapter.

§ 7. **Plan of Analysis to Be Followed Herein.** Following the example set by the General Meeting, we shall likewise find it profitable to take as a basis for our study the draft prepared by the Technical Experts who met in London in April, 1927. In capital letters we shall set out the text of Convention I-a, approved by the Government Experts at Geneva in October 1928, article by article, a statement of the changes made from the London draft, the reasons why they were made, the conflict, if any, of views on the adoption of each article, and the official commentary. Mention should here be made of the fact that the General Meeting ultimately adopted three drafts dealing with income taxation; the first, Convention I-a, to be a model for countries both of which have the system of personal and impersonal taxation; the second, Convention I-b, for countries in whose fiscal systems no such distinction appears; and the third, Convention I-c, to be used by countries, one of which has, while the other has not, such classification of taxes.

§ 8. **Criticism of the Title of the London Draft Convention.** The London meeting adopted a "draft of a bilateral convention for the prevention of double taxation," and another entitled "draft bilateral convention for the prevention of double taxation in the special matter of succession duties."[4] The General Meeting at Ge-

[4] C. 216, p. 8.

neva saw the inconsistency of these two titles and corrected the first by addition of the words "in the special matter of direct taxes." It recognized, in other words, that its scope does not include indirect taxes. In fact the delegates would not have been within their competence to draft such a model convention; they had not been sent by their respective governments for that purpose. "In the special matter of income taxes" would have been a more fitting title, were it not for Article 12, which has reference to "recurrent taxes on total wealth, capital, or increments of total wealth." On the other hand, the Government Experts at the General Meeting did nothing about the direct taxes on motor vehicle owners, a subject now being examined into by the League authorities.

§ 9. Article I. Classification of Taxes.

THE PRESENT CONVENTION IS DESIGNED TO PREVENT DOUBLE TAXATION IN THE SPHERE OF DIRECT IMPERSONAL OR PERSONAL TAXES, IN THE CASE OF THE TAXPAYERS OF THE CONTRACTING PARTIES, WHETHER NATIONALS OR OTHERWISE.

FOR THE PURPOSES OF THIS CONVENTION THE FOLLOWING SHALL BE REGARDED AS IMPERSONAL TAXES:

(a).....
(b).....
(c).....

FOR THE PURPOSES OF THIS CONVENTION, THE FOLLOWING SHALL BE REGARDED AS PERSONAL TAXES:

(a).....
(b).....
(c).....

In the discussion which preceded the adoption of this first article, it became apparent that there existed many differences of opinion as to how it should be worded. In fact seven different problems were presented to the delegates. These were: (1) Shall impersonal and personal taxes be specifically referred to? (2) Shall the turnover

tax be mentioned? (3) Ought the phrase "whether nationals or otherwise" be used? (4) What shall be done about important communal taxes? (5) Are the schedular taxes of South Africa impersonal? (6) Will such a convention, if ratified by two states, affect the rights of other states to whom has been guaranteed most-favored-nation treatment by one of the contracting states? (7) How does such a convention affect the treatment of foreigners?

§ 10. **Personal and Impersonal Taxes.** Dr. de Kuylenstierna (Sweden) was the first to point out the ambiguity of the terms "personal" and "impersonal" when applied to a system of taxation which does not make such a distinction.[5] He called attention to the fact that "this opinion had been put forward in the Swedish observations where it had been shown that the classification was not based on any theoretical distinction, but that it was, on the other hand, determined by practical considerations." He favored, therefore, the proposal made by Dr. Lange, the Norwegian delegate, at the previous session that the General Meeting should consider drafting a special form of convention for states not having personal and impersonal taxes.[6] This idea was heartily favored by Dr. Adams (United States of America), Dr. Lange (Norway), and Sir Percy Thompson (Great Britain). M. Borduge (France) and Dr. Bainoff (Bulgaria) spoke in favor of the appointment of a sub-committee to draft such a convention, and subsequently Convention I-b materialized. In due course we shall study it.

§ 11. **The Turnover Tax.** The representative of the U. S. S. R., Dr. Liubimov, favored the specific inclusion

[5] P. V. 3, pp. 4–6.
[6] P. V. 2, p. 7.

of the turnover tax in the draft convention.[7] He pointed to the growth of the turnover tax since the war, in France, Germany, Italy, Austria, Czechoslovakia, Jugoslavia, Roumania, Hungary, Canada, Brazil, and the Soviet Union, and said that "the classification of taxes as 'direct' and 'indirect' was so confusing and scientifically so defective that many experts" (mentioning Dr. Seligman, Mr. Edgeworth, and Prof. Einaudi) "regarded it as purely conventional."

Professor Zaleski (Poland) called attention to the fact that there was a Polish tax on turnover, which had been specifically mentioned in the Polish-Hungarian treaty.[8] Dr. Dorn (Germany) and Dr. Bolaffi (Italy) thought that the contracting states should always have the right (even in the draft convention) to enumerate the taxes with regard to which there should be reciprocal treatment.[9]

§ 12. **"Whether Nationals or Otherwise."** In the matter of the use of the phrase "whether nationals or otherwise" Professor Zaleski thought it might sometimes be useful and even necessary to conclude conventions applying solely to the nationals of the contracting parties. Moreover, if non-nationals were given the benefits of the treaty, would not the principle of reciprocity be prejudiced? Ought not such benefits be withheld from taxpayers, non-nationals of either contracting state, in order to force such a taxpayer's country to enter into such a treaty? [10]

Dr. Adams assumed the case of States A and B which had concluded a convention providing that all interest on certain classes of securities should be taxed at the domicile of the recipient and that taxpayer X was domiciled

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[7] P. V. 1, p. 11, P. V. 3, pp. 18–21.
[8] P. V. 3, pp. 3–4.
[9] P. V. 3, pp. 2, 3, and 6, 7.
[10] P. V. 3, pp. 3, 4.

in state C, but deriving income from states A and B. In such a case X would be entitled to benefits accruing because of A's agreement with B, a condition which Dr. Adams said was manifestly unfair.[11]

On the other hand, Dr. Dorn stated that even if all nations had concluded bilateral agreements to prevent double taxation, they would be blocked in their purpose unless the treaties applied to "taxpayers whether nationals or otherwise," as, for example, when A, a national of state B, lives in state C, and possesses taxable income-producing property in state D.[12] Dr. Damsté (Netherlands) in answering Dr. Dorn said that Germany and the Netherlands in their treaty had inserted a provision "according to which in the case of a non-national, the highest authorities could adopt the measures necessary to remove the double taxation from which he was suffering, especially if it were a question of the nationals of states which had concluded agreements with the two contracting states in question." The experience of the Netherlands since 1920 had, however, been such that even in the case of other non-nationals the Dutch Government had exempted them, Dr. Damsté said, "even when the countries of those non-nationals did not exempt Dutch nationals established in their territories." [13]

§ 13. **Important Communal Taxes.** The Swedish delegate told the Conference that the municipalities and communes of Sweden impose taxes on income as does also the National Government. Dr. Lange said that in Norway of the sum raised by the taxes on income and on fortune (national and communal), approximately two-thirds goes to the communes.[14] For this reason, he be-

[11] P. V. 3, pp. 7–9.
[12] P. V. 3, pp. 12, 13.
[13] P. V. 3, pp. 13–15.
[14] P. V. 3, p. 11.

lieved, it was essential that a draft treaty should take note of such a situation. Dr. Adams did not refer to the existence within the United States of States which impose income taxes. It is true, however, that as communal taxes on income may have a strong tendency in Scandinavia to bring about double taxation, so may American State income taxes.

§ 14. **South Africa's Tax System.** Mr. Corbett (South Africa) called attention to his country's concern to attract capital and population and said that for that reason its tax system, while schedular, envisaged only income from South African sources.[15] He showed that the schedules were informational only and certainly not impersonal. In other words, South Africa collected taxes on income from South African sources but related such income to the person receiving it. In these circumstances, Mr. Corbett's dilemma was whether his country could use the proposed draft bilateral convention. Dr. Bainoff (Bulgaria) pointed out that Bulgaria had achieved an appreciable reform in 1922 by converting her system of taxes into a purely personal one. (This is also true of South Africa). Then he added, "It is no longer the fashion to have impersonal taxes."[16] He went on to say, however, that stress should be laid on the distinction made between the two kinds of taxation.

§ 15. **International Law Questions.** After many representatives had spoken on the relation of such a convention as the one under consideration to the treatment of foreigners, and to its effect on the doctrine of the most-favored nation clause in certain treaties, M. Clavier, the Chairman, with the consent of the Conference, designated

[15] P. V. 2, pp. 1–3 and P. V. 3, pp. 1, 2.
[16] P. V. 3, p. 16.

Dr. Dorn (Germany) and M. Blau (Switzerland) to act as delegates on the first of these subjects and M. Borduge (France) and Dr. Damsté (Netherlands) to act as delegates on the second of the subjects whenever they should be discussed by the Economic Committee of the League.[17]

§ 16. Commentary on Article I. The following commentary was finally officially approved:[18]

> "This article defines the purpose of the present convention; it is designed to prevent double taxation in the sphere of direct taxes in the case of the taxpayers of the contracting parties.
>
> "The tendency of modern fiscal law is to consider that all persons domiciled in a state should be liable to the same taxation therein whatever their nationality may be. This is why Article I of the draft speaks of all taxpayers, whether nationals or otherwise. Supposing, for instance, that two states A and B have concluded a convention on these lines, the nationals of a third state C which had not concluded a similar agreement will nevertheless be entitled to the benefits of the treaty, if they are taxpayers of states A and B, either because they have their fiscal domicile in these states or derive income from them.
>
> "If, for economic reasons, or with a view to inducing certain states to conclude similar conventions, the contracting parties deem it preferable provisionally to limit the scope of the convention to their own nationals, they need only delete in the text of Article I the words 'whether nationals or otherwise.' They may, on the other hand, extend its application to the nationals of states with which they have concluded such conventions.

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[17] P. V. 4, pp. 2, 3.
[18] C. 562, p. 10.

"After stating the general purpose of the convention, Article I defines its scope: it governs direct impersonal or personal taxes.

"Desirous of avoiding any controversy on matters of doctrine, the experts have not defined the two great categories of direct taxes. They merely note, by way of indication, that impersonal taxes are in most cases levied on all kinds of income at the source, irrespective of the personal circumstances of the taxpayer (nationality, domicile, civil status, family responsibilities, etc.) thus differing from personal taxes which rather concern individuals and their aggregate income.

"The contracting states will themselves decide which of their direct taxes they regard, for the purposes of the convention, as being impersonal or personal taxes.

"Similar forms of taxation levied on behalf of subordinate public bodies (provinces, cantons, or departments, municipalities, etc.) may be included in the list, if circumstances justify such a measure, as well as the tax on business turnover in so far as this is in the nature of direct taxation.

"The assignment of individual taxes to the two categories of direct taxes mentioned above is particularly important, as the draft lays down different provisions as regards each of these categories.

"If necessary, the rules governing impersonal taxes might be made to apply to all special forms of income tax imposed by the state of origin and limited to income derived from sources situated in that state."

§ 17. **Principal Divisions of Draft Convention I-b.** Both at London and Geneva it was decided that there should be three principal divisions of the convention we are considering. After Article I should come a statement of the provisions with regard to impersonal taxes, in

Article 10 should be found those concerning personal taxes, and after Article 10 certain miscellaneous provisions.

§ 18. Article 2. Income from Immovable Property.

THE INCOME FROM IMMOVABLE PROPERTY, i. e., THAT WHICH CORRESPONDS TO THE ACTUAL OR PRESUMED RENTAL VALUE OF SUCH PROPERTY, AS WELL AS ANY OTHER INCOME FROM SUCH PROPERTY WHICH IS NOT COVERED BY ARTICLE 5, SHALL BE TAXABLE IN THE STATE IN WHICH THE PROPERTY IN QUESTION IS SITUATED.

THIS RULE SHALL APPLY TO INCOME FROM MORTGAGES OR OTHER SIMILAR OBLIGATIONS.

This is the text adopted at Geneva. It differs from the London text only in the last word, the revisers believing "obligations" to be preferable to "claims."[19] The French text in both cases reads, "*ou des autres créances analogues.*" The only suggestion of a change in the wording of this Article came from the Soviet Government delegate, who preferred that it should begin with the words "Immovable property and the income therefrom. . . ."[20]

The Spanish representative announced that he had been formally instructed to state that his government could not depart from its practice of taxing interest on mortgages if paid in Spain, although the property secured by the mortgages was situated abroad.[21]

§ 19. Commentary on Article 2. The officially approved commentary reads thus:[22]

"Article 2 embodies a generally accepted principle: that income from immovable property, i.e.,

[19] C. 216, p. 10.
[20] P. V. 4, p. 7.
[21] P. V. 4, pp. 5, 6.
[22] C. 562, pp. 10, 11.

the income which corresponds to the actual or presumed rental value, as well as every other form of income from immovable property not covered by Article 5, shall be taxable in the state in which the property in question is situated.

"The above principle applies, irrespective of the nature of the right or fact (property, usufruct, possession, lease in perpetuity, etc.), from which the taxable income is derived.

"The term 'other income from such property' is only intended to cover income which is not derived from industrial, commercial or agricultural undertakings, mentioned in Article 5 of the draft.

"The second paragraph of Article 2 lays down that the rule set forth in the first paragraph shall apply to income from mortgages and other similar obligations.

"This provision is intended to apply to income from mortgages or other similar obligations whether it is deducted from the income derived from the immovable property or not. If the deduction referred to is not made, special measures will have to be taken in order to prevent the state of domicile from having to grant excessive relief."

§ 20. Interest.

INCOME FROM PUBLIC FUNDS, BONDS, INCLUDING MORTGAGE BONDS, LOANS AND DEPOSITS OF CURRENT ACCOUNTS, SHALL BE TAXABLE IN THE STATE IN WHICH THE DEBTORS OF SUCH INCOME ARE AT THE TIME RESIDENT.

At London there had been a second paragraph in this Article which reads as follows:[23]

"Nevertheless, if such income is paid in one of the contracting states to persons domiciled in the other contracting state, the tax applicable thereto

[23] C. 216, p. 10.

shall be refunded upon production of proper evidence. In such cases the said income may be taxed in the state of domicile of the creditor."

§ 21. Reasons for Foregoing Decision. At Geneva Sir Percy Thompson very effectively pointed out the inconsistency of this second paragraph if both contracting states had similar understandings as to impersonal and personal taxes. Its effect, he showed, "would be to encourage nationals of each country to invest in bonds of the other."[24] It had its place in a suggested draft only if "Imeria" and "Morania" had different systems. Since, however, a special convention was being prepared, while this discussion was going on, to take care of countries both or neither of which had personal and impersonal taxes, it became increasingly clear that this second paragraph should be deleted.

Dr. Bolaffi (Italy) attacked it because it made "use of that instrument of evil known as the affidavit" as well as because the second paragraph created a serious breach in the system of collecting impersonal taxes at their source.[25] Prof. Zaleski outlined the difficulties of enforcement if abatements were involved, or if the fiscal years or periods of assessment of the two countries did not harmonize.[26]

Concerning this paragraph Dr. Egger had submitted a memorandum in which he had said:[27]

> "As regards the exception to the general rule of paragraph 1 in favor of commercial loans, deposits, and current accounts, to which the commentary calls attention, this exception must not apply

[24] P. V. 4, pp. 8, 9, and P. V. 9, p. 2.
[25] P. V. 4, p. 7.
[26] P. V. 4, pp. 7, 8.
[27] D. T. 130, pp. 1, 2.

> to investments in leading institutions or banks, the interest on which should be taxed without exception—regardless of the status of the creditor or the source—and by the method of deduction."

Professor Zaleski referred approvingly to these observations and recommended the deletion of the second paragraph as did also M. Kempels (Latvia) and Dr. Bainoff (Bulgaria), M. Blau (Switzerland), Dr. Vlasak (Czechoslovakia), Mr. Corbett (South Africa) and, of course, Dr. Egger (Austria). The paragraph was deleted, but reference thereto was authorized to be made in the commentary.

§ 22. **Alternative Proposals.** Professor Flores de Lemus (Spain) proposed a new second paragraph which the other delegates did not favor, reading as follows:[28]

> "Nevertheless the contracting states may agree to divide the interest on obligations (including mortgage bonds) of undertakings envisaged by Article 5, according to the rules laid down in that Article."

The delegates, however, voted to mention this as a second alternative plan in the commentary.

M. Borduge (France) proposed the following amendment to the text of this Article, which Professor Adams supported:[29]

> "If such income is paid in one of the contracting states to persons domiciled in the other contracting state, and if the state of domicile taxes such income under its own legislation, it should take into account, by assessment or by means of a refund, taxes paid by priority in the other state."

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[28] P. V. 9, pp. 3, 4.
[29] P. V. 9, p. 15.

M. Blau (Switzerland) spoke against the amendment as did also Dr. Bolaffi (Italy) and Dr. Bainoff (Bulgaria). The final vote was 16 to 3 against the amendment.[30]

§ 23. **Apparent Inconsistency.** It will seem inconsistent to American readers, for a treaty to provide in Article 2 for the taxation of "interest from mortgages" and in Article 3 for the taxation of "income from . . . bonds, including mortgage bonds," and more especially so when a different rule is considered possible in the two cases. The intention of the General Meeting on this point is more clearly expressed in the fourth paragraph of the following official commentary.[31]

§ 24. **Commentary on Article 3.**

> "This clause deals with income derived from investments in transferable securities other than shares.
>
> "It lays down that income from public funds, bonds, including mortgage-bonds, loans, and deposits or current accounts shall be taxable in the state in which the debtors of such income are at the time resident.
>
> "By 'public funds' is meant the securities issued by the state or by other public bodies (provinces or departments, cantons, municipalities, other public establishments, etc.).
>
> "The bonds considered are those of non-commercial *(sociétés civiles)* or commercial companies, even if secured by mortgages.
>
> "As regards loans, deposits, or current accounts, these terms are here used with their legal or customary meanings; as a rule, this clause will

[30] P. V. 9, p. 19.
[31] C. 562, p. 11.

only be applied to income from non-commercial loans, deposits or current accounts. Interest on professional accounts opened for business purposes by traders or persons engaged in industry is, in fact, included under profits of business undertakings, which are covered by Article 5.

"As regards interest on deposits or current accounts, the debtor is the establishment or branch which pays this interest.

"The contracting states shall decide whether a second paragraph should be added to Article 3 providing for an exception to the rule laid down in the first paragraph. This exception might be worded as follows:

" 'If this income is paid in one of the contracting states to persons domiciled in the other contracting state, the tax applicable thereto shall be refunded upon production of proper evidence. In such case, the said income may be taxed in the state of domicile of the creditor.'

"This would be a special clause to be discussed between the contracting states. The refunding of the tax by the state of the debtor will generally depend upon economic or budgetary conditions; the levying of the tax by the state of the creditor will in some cases, however, be justified by reasons of equity, but will not be compulsory. Such refund may be limited to certain forms of income and made contingent upon the application of the deduction provided for under Article 10.

"Where necessary, measures will have to be taken to prevent fraud by means of affidavits or other documents signed by or on behalf of the persons entitled to the income. In this connection reference should be made to the Draft Convention on Administrative Assistance.

"A request was put forward that the tax on income from bonds might, if necessary, be shared

according to the rules laid down in Article 5. This view was not generally accepted, but it was thought that the procedure suggested might be adopted by countries where special circumstances existed. The same observation applies to income from shares and to managers' fees referred to in Articles 4 and 6 below."

§ 25. Article 4. Dividends.

INCOME FROM SHARES OR SIMILAR INTERESTS SHALL BE TAXABLE IN THE STATE IN WHICH THE REAL CENTRE OF MANAGEMENT OF THE UNDERTAKING IS SITUATED.

This is the text approved both at London and Geneva. Prof. de Lemus again introduced an amendment similar to the one he submitted to Article 3.[32]

§ 26. Real Center of Management. Dr. Bolaffi mentioned the difficulty of knowing legally where the "real center of management" of international trusts is. The draft convention did not refer to the head office *(siège)* but to the real center of management *(direction effective)*. He then cited the Ford interests, which had branches in many countries, while the real center of management of all the branches was in America. To eliminate as much of the problem as possible, he suggested that the word "undertaking" be changed to "company."[33]

Dr. Bainoff thought that the word "real center of management" should be changed to "effective operation" to meet the situation created by corporations whose activities were on the territory of one state, but whose directors actually met in another state.[34]

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[32] P. V. 5, p. 3.
[33] P. V. 5, pp. 3, 4.
[34] P. V. 5, pp. 4, 5.

Sir Percy Thompson vigorously opposed the present wording unless there were authorized some alternative solution consonant with British practice and interests, similar to the second paragraph of the third Article approved at London—now made applicable to dividends.[35] Sir Percy's protest became effective when the General Meeting approved Draft Convention I-b.

After Dr. Damsté had called attention to the delegates to the way in which the interests of the Grand Duchy of Luxemburg had suffered from double taxation (which could not be cured by its adoption of Article 4 as a working principle), Prof. Zaleski stated that in Poland a foreign limited-liability company could not carry on operations until it had received a permit from the Minister of Finance who granted it on condition that the capital to be used in Poland should be separate, that the company should maintain a representative in Poland, that it should furnish a description of its head offices in Poland, and that in this way the Polish authorities construed the phrase "the real center of management."[36]

§ 27. **Apportionment of Dividends.** Mr. Corbett told the Conference that the experience of the South Africa Government showed that it is extremely difficult to apportion dividends accurately either according to countries where earned or the year out of whose earnings they were paid. Investors, he said, were interested in the return they would receive on their investment, and were not especially interested in the countries where activities of their corporation were carried on. Dividends paid by one corporation to another are not taxable under the laws of the Union of South Africa.[37]

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[35] P. V. 5, p. 5.
[36] P. V. 5, p. 6.
[37] P. V. 5, p. 8.

M. Blau held if a branch earned no profits for one year, whereas the undertaking as a whole nevertheless paid dividends, the authorities of the country where the branch was located should be entitled to hold that the undertaking had earned profits on their territory and in the future to tax that establishment on an amount proportional to the profit of the undertaking as a whole. This is really a problem more directly coming under the next Article than the present one, but it is nevertheless closely related.[38]

§ 28. American System of Taxing Dividends. Dr. Adams then explained to the Conference that under American Federal Laws no taxes whatever are imposed on corporations or dividends with respect to the center of management, but only with respect to the legal home of the company. "There are numerous companies," he said, "organized under Canadian law, which have property and carry on business outside the United States but which are in fact controlled from the United States where their central management is situated. Would a country be induced to acknowledge that the true center of management of such companies was in the United States, and be prepared to surrender to the United States the right to tax the dividends of such companies? There are, on the other hand, numerous companies in various parts of the United States, which carry on business and possess property in the United States, but whose center of management is in foreign countries. Would the United States be asked to admit that the tax on the dividends of such companies be surrendered to the foreign countries?" Dr. Adams frankly stated that he did not believe it possible to distinguish between the legal home

[38] P. V. 5, pp. 9–10.

and the real center of management for taxation purposes.[39]

§ 29. **Bulgarian Amendment.** Dr. Bainoff next proposed an amendment reading as follows:[40]

> "Income from shares or similar interests shall be taxable in the state in which the business of the undertaking is actually carried on."

The Chairman suggested that "head offices" be substituted for "business," but this idea was not accepted by the Bulgarian delegate, who in the course of his remarks said, "The income of a company is earned in the place where the effective operations of the company are carried on." He mentioned the case of the Sofia Tramways Company whose center of management was Brussels, but whose center of operations was Sofia. If asked how was the income to be taxed at Sofia when the dividends were paid at Brussels, he would reply that it was a question of technique and he "would not insult his colleagues by supposing that they were not familiar with the solution." Dr. Bolaffi (Italy) disagreed with the proposal because it left nothing for the country which furnished the capital, and further because it would be difficult to ascribe an accurate proportion of the dividends to management and another to operations.

M. Blau declared that "the source of income was the place in which the capital was furnished and in which the brain of the undertaking was situated. As to the yield of the work of operation, that was referred to in Article 5."[41] Dr. Bolaffi withdrew his amendment without a formal vote being taken thereon.

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[39] P. V. 5, pp. 10–11.
[40] P. V. 9, pp. 19, 20.
[41] P. V. 9, p. 20.

§ 30. Commentary on Article 4.

The meeting adopted the following commentary on this article:[42]

"Income from shares or similar interests is the subject of Article 4 of the draft; under the provisions of this article, it is taxable in the State in which the real centre of management of the undertaking, that is to say the management and control of the business, is situated, so that the case of a purely nominal centre of management is excluded.

"This clause will have to be supplemented if it is agreed that the system of refunds contemplated in the commentary on Article 3 shall apply also to dividends. Here, again, the determining factors will be economic or budgetary considerations, or even political circumstances.

"It must also be noted that draft Convention No. I-b contemplates this more extended system of relief."

§ 31. Article 5. Business and Professional Income.

INCOME, NOT REFERRED TO IN ARTICLE 7, FROM ANY INDUSTRIAL, COMMERCIAL OR AGRICULTURAL UNDERTAKING AND FROM ANY OTHER TRADES OR PROFESSIONS SHALL BE TAXABLE IN THE STATE IN WHICH THE PERMANENT ESTABLISHMENTS ARE SITUATED.

THE REAL CENTRES OF MANAGEMENT, BRANCHES, MINING AND OILFIELDS, FACTORIES, WORKSHOPS, AGENCIES, WAREHOUSES, OFFICES, DEPOTS, SHALL BE REGARDED AS PERMANENT ESTABLISHMENTS. THE FACT THAT AN UNDERTAKING HAS BUSINESS DEALINGS WITH A FOREIGN COUNTRY THROUGH A BONA FIDE AGENT OF INDEPENDENT STATUS (BROKER, COMMISSION AGENT, ETC.) SHALL NOT BE HELD TO MEAN THAT THE UNDERTAKING IN QUESTION HAS A PERMANENT ESTABLISHMENT IN THAT COUNTRY.

SHOULD THE UNDERTAKING POSSESS PERMANENT ESTABLISHMENTS IN BOTH CONTRACTING STATES,

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[42] C. 562, p. 12.

EACH OF THE TWO STATES SHALL TAX THE PORTION OF THE INCOME PRODUCED IN ITS TERRITORY. THE COMPETENT ADMINISTRATIONS OF THE TWO CONTRACTING STATES SHALL COME TO AN ARRANGEMENT AS TO THE BASIS FOR APPORTIONMENT.

NEVERTHELESS, INCOME FROM MARITIME SHIPPING AND AIR NAVIGATION CONCERNS SHALL BE TAXABLE ONLY IN THE STATE IN WHICH THE REAL CENTRE OF MANAGEMENT IS SITUATED.

§ 32. **Paragraph 1 Discussed.** The first paragraph of this Article as approved at London was worded as follows:[43]

> "Income from any industrial, commercial, or agricultural undertaking and from any other trades or professions shall be taxable in the state in which the persons controlling the undertaking or engaged in the trade or profession possess permanent establishments."

Two attacks were made on this provision by Dr. Adams. In the first place there would be the ever present difficulty of legally proving the matter of control. In the second place, confusion would result unless some specific reference were made to the different taxation planned for certain salaries and wages which would otherwise reasonably be construed as income conceived of as taxable under this Article.[44]

§ 33. **Paragraph 2 Discussed.** The first sentence of the second paragraph of this article approved at London was "The real centers of management, affiliated companies, branches, factories, agencies, warehouses, offices,

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[43] C. 16, p. 10.

[44] P. V. 6, p. 6. A change authorized was the addition of the words "not referred to in Article 7" after the word "professions" in the English text. Since, however, the approved French text read as follows: *"Les revenues non visés à l'article 7 de toutes exploitations industrielles, etc.,"* the English version added the words agreed upon immediately after "income."

depots, shall be regarded as permanent establishments.'' [45]

In discussing the previous Article mention has been made of the differences of opinion as to the advisability of using the ''real center of management'' as the test of taxability. Two other important differences of opinion developed with regard to other items mentioned in this sentence. The first centered in the words ''affiliated companies,'' the second in a proposal to tax enterprises if their purchases of goods were made through the medium of a regularly established purchasing office.

§ 34. **Affiliated Companies.** Dr. Adams inquired as to the exact meaning of the term ''affiliated companies,'' by asking whether the U. S. Steel Corporation, if it owned all the stock of a Belgian corporation which had its property and carried on its business in Belgium, would be deemed to have a permanent establishment in Belgium.[46] He was unwilling to assent to any such interpretation and would prefer the deletion of the words ''affiliated companies'' if such an inference were intended. He said that he would not regard a Belgian corporation which owned shares in an American company as having a permanent establishment in the United States. With this view M. Clavier, the Chairman, agreed, stating, ''The Belgian administration for its part would never think of regarding an American company as having a permanent establishment in Belgium by reason of the fact that it possessed all the stock in a Belgian company. The latter would be taxed as a Belgian company in accordance with law.'' Furthermore, in default of any categorical statute, the Belgian authorities, M. Clavier told the Conference, agreed that Belgian com-

[45] C. 216, p. 11.
[46] P. V. 5, p. 14.

panies with important share holdings should be taxed at a very reduced rate with respect to their profits of foreign origin.

M. Blau (Switzerland) also favored the deletion of the words "affiliated companies" because their use invariably led to confusion, and furthermore because the word "*filiales*" used in the French text is not the same in meaning as "*sociétés affiliées,*" and it is this latter expression which more closely corresponds with the idea of "affiliated companies" in English.[47] Dr. Liubimov (U. S. S. R.) also called attention to this ambiguity.

Prof. de Lemus told the Meeting that Spain had a law which explicitly stipulated that such a company as Dr. Adams had mentioned would be a *filiale* of the American corporation and the taxation principle applied would be exactly the opposite of that obtaining in Belgium.[48]

Dr. Bolaffi said that if a limited liability company were established in Italy, whose stock was owned by a foreign corporation, and if the Italian company were thus organized with a small capital and all its deposits, current accounts, funds, etc., registered in the name of the parent corporation, Italy would be bound to regard the *société affiliée* as being a *filiale* of the parent company, and to take legal proceedings against the parent company in regard to its assets located in Italy. He opposed the deletion of the words "affiliated companies" unless there were introduced into the commentary a clear interpretive clause.[49] Dr. Dorn also suggested this, citing the Protocol to the German-Italian treaty.[50]

M. Blau suggested that for the dissimulation of profits which the Italian delegate feared, the remedy was to be

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[47] P. V. 5, p. 15.
[48] P. V. 5, p. 19.
[49] P. V. 5, pp. 19, 20.
[50] P. V. 6, p. 1.

sought in another way. A state always has the right to examine balance sheets and income accounts. If a parent company reduced the profits of its subsidiary by requiring it to make heavy payments of interest on moneys advanced, of course, the government should take cognizance thereof, but such a course only means that a government may protect itself against fraud.[51]

The words "affiliated companies" were deleted.[52]

§ 35. **Taxation of Exports.** The Soviet Government delegate held that it was essential "to prevent double taxation by the importing country of products which had already been taxed by the exporting country." So it became necessary, he argued, to provide that "the exporting country has an incontestable right to tax the goods."[53] In view of this statement, it is surprising to find that the Soviet proposal for Article 5 begins "It is agreed that only the sale of goods and not the purchase of goods shall be taxed. For this reason, the operations shall be taxed in the country in which the undertaking sells the goods." The Soviet explanation is that exports are "for the manifest purpose of being sold, although such sale does not take place within the borders of the exporting country." The conference did not accept this proposal.[53]

§ 36. **Purchasing and Selling Agencies.** Along a somewhat similar line Dr. Bainoff proposed that after the word "depots" in the text, there be added "purchasing or selling agencies."[54] He said that a certain tobacco company maintained no establishment in Bulgaria, Poland, or Russia except to purchase tobacco, and that

[51] P. V. 6, p. 7.
[52] P. V. 9, p. 21.
[53] P. V. 5, p. 18.
[54] P. V. 6, p. 8.

its selling agencies, its center of management, etc., were all in some other countries. "The fact of buying represents, in this particular instance, a permanent economic profession," he said. Sir Percy Thompson's rejoinder was that the delegates were assembled to devise means to prevent, and not create new cases of double taxation; that "Bulgaria should be thankful if foreigners entered her territory with the object of purchasing her products and should not in any way seek to impose a fiscal burden upon them." Here Dr. Adams announced that Bulgaria was certainly within her rights, in theory at any rate, "in imposing a tax on nonresidents possessing a purchasing agency in her territory if she desired to do so." The problem, however, was subtler than that of recognizing the right. It was how to determine the proportion. He then cited from his own experience as a tax commissioner of the state of Wisconsin, what that state had done along this line. A corporation organized under the laws of some other state maintained a purchasing agency for tobacco in Wisconsin. The courts decided that a tax on such a company was legal. Thereupon the Tax Commission was flooded with claims for refunds on the part of Wisconsin corporations on the ground that they effected purchases outside the state, although all their other activities were within the state. Wisconsin soon revised her law so as not to tax purchasing agencies of foreign corporations. Then Dr. Adams added that the model convention should secure the exemption of purchasers, for "No expert could really believe that it was possible successfully to solve the question of ascertaining what proportion of profit was ascribable to the purchase of goods and no attempt should therefore be made to do so." [55]

[55] P. V. 6, pp. 8–9.

Dr. Egger had said that he believed that the list of permanent establishments should include the purchasing and selling agencies. Austria had always done so in the treaties which she had negotiated.[56] Despite certain remarks favorable to such an inclusion, Dr. Bainoff withdrew his amendment.

§ 37. **Minor Items of Phraseology.** Minor changes of phraseology in this same first sentence of the second paragraph of Article 5 were suggested. Dr. Damsté wished mining and oil fields to be specifically mentioned.[57] The meeting agreed. Prof. Flores de Lemus asked that "workshops, plants, purchasing and selling agencies" be added after "factories." Dr. Dorn feared the ambiguity of the word "plant," and it was omitted as well as "purchasing and selling agencies," but a reference to these agencies was voted to be inserted in the commentary. Prof. Flores de Lemus spoke of such "installations" as are mentioned in Spanish law, for example, "landing stages, elevators, etc." Dr. Dorn preferred that the commentary should mention "installations serving as bases of operation for commercial enterprises." It was pointed out to the meeting that in English the word "installation" is seldom used in the plural, and that its usual meaning in the singular is "the act of inducting a person into office." For that reason the meeting voted to insert instead the word "workshops." [58]

§ 38. **Bona Fide Agent of Independent Status.** The second sentence of the second paragraph of Article 5 as quoted on page 179 is also found in the London draft. The only real question involved therein to provoke any discussion was the reference to a "*bona fide* agent of

[56] P. V. 6, p. 2.
[57] P. V. 6, pp. 3–5.
[58] P. V. 6, p. 10.

independent status." Dr. Egger called the attention of the Conference to the sentence in the Austrian treaty with Switzerland which says:[59]

> "If an agent of independent status, not housing any goods belonging to the firm with which he is connected, does nothing more than act as an intermediary for the latter, without having any authority to conclude definite transactions, such an organization should not be considered as an establishment."

Instead of this form of solution, Dr. Liubimov suggested deleting "*bona fide*" because to his mind it had a moral rather than a juridical connotation.[60] He favored instead reference to an "agent not provided with a power of attorney and not acting in the name of the concern." To this the Chairman replied that such a wording might lead to "a false declaration, namely, a statement by the firm that its agent had not been provided with a power of attorney."[61] The Chairman was upheld and the words "a *bona fide* agent of independent status" *(un agent vraiment autonome)* were officially approved.

§ 39. **Paragraph 3 Discussed.** The third paragraph was retained intact as written at London. Dr. Egger suggested that the expression "the portion of the income produced in its territory" might be replaced by "the portion of the income accruing from its activities in the territory." He did not press the point, however, though he stated that he wished the text of the convention to apply in all cases. The Chairman then upheld the original wording, but reminded the meeting that this was a

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[59] P. V. 6, p. 2.
[60] P. V. 6, pp. 10–11.
[61] P. V. 6, p. 12.

"model convention, and was not supposed to be a model *ne varietur.*" [62]

§ 40. Paragraph 4 (London Draft) Discussed. At London the fourth paragraph of this Article read: [63]

> "In the absence of accounts showing this income separately and in proper form, the competent administrations of the two contracting states shall come to an arrangement as to the rules for apportionment."

The changes effected therein at Geneva were three in number. First, it was decided to omit the introductory phrase "In the absence of accounts showing this income separately and in proper form." Secondly, the word "basis" was inserted in place of "rules." And finally, the shorter sentence remaining was placed in the same paragraph with the previously approved sentence, "Should the undertaking possess permanent establishments in both contracting states, each of the two states shall tax the proportion of the income produced in its territory."

§ 41. Absence of Accounts. Dr. Egger was the first to speak to the delegates with regard to the absence of accounts. A synopsis of his remarks on this point follows: [64]

> "The arrangements between competent administrations mentioned in paragraph 4 should be established generally and not only in the case of the absence of books, as was stipulated in that paragraph, since even if special accounts existed, serious cases of double taxation might arise. The

[62] P. V. 6, p. 2.
[63] C. 216, p. 11.
[64] P. V. 6, pp. 2, 3.

> taxpayer would be making up his special accounts but they might be modified, first by one state and then the other, if the fiscal authorities did not see eye to eye on the matter. Thus special agreements would be necessary for a fair division of profits, a division which should be irrespective of the special accounts drawn up by the manager of the concern. Austria has made arrangements of this kind with Czechoslovakia and Hungary. The profits from a commercial activity spread over two states were considered to be produced half in one state and half in the other; the profits of an industrial activity extending to the other state and selling its goods there were regarded as accruing two-thirds from the state where the goods were produced, and one-third from the state where they were sold."

Dr. Damsté considered that "the general principles of this method of apportionment should be embodied in the convention itself. It was a problem which raised a good many difficulties both of a theoretical and a practical nature. For that reason he would favor the idea formulated in the memorandum from the Government of the U. S. S. R."[65] He ended his remarks on this subject, however, by saying that "it was better perhaps to insist upon the necessity for such rules and leave the actual formulation of them to the states concerned."

M. Blau was of the opinion that the rules for apportionment should be worked out later, probably by the Permanent Organization.[66]

Prof. Flores de Lemus opposed the paragraph as it stood because it outlined a procedure foreign to Spanish law. He showed that[66] "if a firm made considerable

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[65] P. V. 6, p. 4. This is a direct quotation from the minutes, not a direct quotation of what Dr. Damsté said.

[66] P. V. 6, p. 13. This is a direct quotation from the minutes.

profits in Spain, whereas on the whole its general balance sheet showed a loss, the Spanish Government imposed no tax. The question was, what fiscal capacity could an undertaking of that kind possess? If the company taking its business as a whole showed profits, it had to pay a portion of the tax. That was Spanish law and it was impossible for him to accept any other procedure."

§ 42. **Maritime Shipping.** The last paragraph of this Article as approved at London reads as follows:[67]

> "Nevertheless, income from maritime shipping concerns shall be taxable only in the state in which the real center of management is situated."

In the London commentary appeared the following sentence:[68]

> "This paragraph may, according to circumstances, be deleted or its provisions limited."

The Austrian, Polish, and Soviet representatives thought the provisions of the Article above quoted too broad.[69] They believed that income from subsidiary activities of shipping concerns ought to be taxed where earned. Under this heading they would include warehousing, special commercial and banking operations.

The Bulgarian and Czechoslovak representatives wanted the entire paragraph omitted.[70]

The Japanese expert favored the deletion of the sentence quoted from the commentary, primarily on the ground that a model convention ought to be a model and ought not to set up a group of alternatives from which

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[67] C. 216, p. 11.
[68] Ibid., p. 15.
[69] P. V. 7, p. 7.
[70] P. C. 7, pp. 8–11.

choices could be made as nations see fit.[71] Dr. Scie-Ton-Fa (China) suggested that a model convention should be sufficiently elastic to be acceptable to all nations.[72] The Italian representative could not understand "the reason for which it was desired to prevent the retention in the commentary of all trace of a discussion which had been renewed at each meeting of the technical and government experts of the League."[73] In addition he said that "Italy which already possessed a fleet that was more than adequate for its national requirements might consider the possibility of not granting exemption to all flags, in order to obviate the risk of competition between foreign ships and Italian ships in Italian ports." He favored a partial application of the reciprocal provision, but not the absolute in such matters. Italy was willing to exempt certain foreign ships, he said, on a *quid pro quo* basis. To prevent double taxation of shipping profits he desired "the application of the general rule on the valuation of the income of the concern as between the different foreign establishments of the company."

Again with reference to the idea of *quid pro quo,* the delegate from South Africa spoke, as did also Dr. Damsté on behalf of the Government of the Dutch East Indies. That government, he stated, if foreign shipping were exempted, "would sustain a very considerable loss, which could not be compensated by taxes on its own shipping" because it has none.[74] Holland, appreciating the situation as it exists in her East Indies possessions, therefore opposed the deletion of the sentence in the commentary, contrary to the wishes of the Japanese delegate. Mr. Corbett (South Africa) said that he would

[71] D. T. 135, pp. 1, 2.
[72] P. V. 7, p. 6.
[73] P. V. 7, pp. 4, 5.
[74] P. V. 7, pp. 7–8.

not oppose the approval of the suggested provision in the model convention but that his government, for budgeting reasons, was not in a position to grant such an exemption.[75]

§ 43. Air Navigation. The principal speech on the shipping exemption was made by Mr. Cleminson, secretary of the International Shipping Conference; and on a special provision for air navigation companies by Sir Samuel Instone, Director of the International Air Transport Association. The official synopses of their remarks are furnished herein as Appendixes A and B (pp. 267–272). They were heartily supported by certain of the delegates, especially by Dr. Lange and Prof. Adams.[76]

It was decided to add the words "and air navigation" after the words "maritime shipping" in the text of the London draft, and to make changes in the commentary to harmonize it with the sense of the General Meeting.

§ 44. Commentary on Article 5. The official commentary on Article 5 reads as follows:[77]

> "This clause has reference to income from any industrial, commercial or agricultural undertakings, and from any other trades or professions, not referred to in Article 7; it is to be taxable in the countries in which the permanent establishments are situated.
>
> "The word 'undertakings' must be understood in its widest sense, without making any distinction between natural and legal persons.
>
> "The second paragraph gives a list of the establishments which are considered as permanent;

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[75] P. V. 7, p. 3.

[76] P. V. 7, pp. 10–11, 14–15.

[77] C. 562, pp. 12–13. An error in the text as printed was corrected in the official corrigenda.

they are: real centers of management, branches, mine and oilfields factories, workshops, agencies, warehouses, offices and depots, no matter whether such establishments are used by the traders themselves, by their partners, attorneys, or their other permanent representatives.

"Nevertheless, the fact that an undertaking has business dealings with a foreign country through a *bona fide* agent of independent status (broker, commission agent, etc.) shall not be held to mean that the undertaking in question has a permanent establishment in that country. The words '*bona fide* agent of independent status' are intended to imply absolute independence, both from the legal and economic point of view. The agent's remuneration must not be below what would be regarded as a normal remuneration. The committee has not expressed an opinion on the point whether purchasing offices or sales offices and plants are to be considered as places of business, this being a question of fact.

"Paragraphs 2 and 3 of this clause govern the case in which the undertaking possesses permanent establishments in both contracting states; in that event, 'each of the two states shall tax the portion of the income produced in its territory.' This is an application of the so-called system of apportioning the income according to its source.

"The competent administrations of the two contracting states shall come to an arrangement as to the bases for apportionment."

"These bases will vary essentially according to the undertakings concerned; in certain states account is taken, according to the nature of the undertakings, of the amount of capital involved, of the number of workers, the wages paid, receipts, etc. Similarly, in cases where the products of

factories are sold abroad, a distinction is often made between 'manufacturing' and 'merchanting' profits, the latter being the difference between the price in the home market and the sale price abroad, less cost of transport. These criteria are, of course, merely given as indications.

"The last paragraph of Article 5 contains an express exception to the principle laid down in the first paragraph: it provides that income from maritime shipping or air-navigation concerns shall be taxable only in the state in which the real centre of management is situated.

"If maritime shipping or air-navigation concerns carry on other activities independent of shipping (for example, the business of sale of goods, banking or of a warehouse-keeper), such activities will respectively be dealt with in accordance with the other provisions of this convention.

"Furthermore, the scope of the last paragraph of Article 5 may be extended so as to apply also to river and lake shipping."

§ 45. Article 6. Directors' Fees.

THE FEES OF MANAGERS AND DIRECTORS OF JOINT STOCK COMPANIES SHALL BE TAXABLE IN ACCORDANCE WITH THE RULE LAID DOWN IN ARTICLE 4.

Both this Article and its commentary agree *in toto* with the London recommendations.[78]

Prof. Flores de Lemus submitted an amendment similar to those he had proposed to Articles 3 and 4. The chairman suggested that later the three might be discussed together. This plan met with the approval of the Spanish delegate.[79] But later no change was made.

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[78] C. 216, pp. 11–15.
[79] P. V. 7, p. 17.

§ 46. **Commentary on Article 6.** The official commentary follows: [80]

> "This article provides that the fees of managers and directors of joint-stock companies shall be taxable in accordance with the rule laid down in Article 4, that is, in the state in which the real centre of management of the undertaking is situated.
>
> This provision is designed to cover the special tax on variable fees, which are deducted from profits and hence constitute a part of the latter. Fixed salaries, on the contrary, come within the category of general expenditure and are governed by the following article."

§ 47. **Article 7. Salaries, Wages, etc.**

> SALARIES, WAGES OR OTHER REMUNERATION OF ANY KIND SHALL BE TAXABLE IN THE STATE IN WHICH THE RECIPIENTS CARRY ON THEIR EMPLOYMENT.
>
> SALARIES OF OFFICIAL AND PUBLIC EMPLOYEES WHO ARE SERVING ABROAD SHALL, HOWEVER, BE TAXABLE IN THE STATE WHICH PAYS THESE SALARIES.

In the minutes of the seventh session there appear, concerning Article 7, the following significantly brief statements. "Neither paragraph of Article 7 gave rise to any discussion. The text was adopted." [81] The text referred to was that adopted at the London Meeting.[82]

§ 48. **Commentary on Article 7.** The commentary follows: [83]

> "Salaries, wages and other remuneration of any kind (with the exception of the fees mentioned in

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[80] C. 562, p. 13.
[81] P. V. 7, p. 17.
[82] C. 216, p. 11.
[83] C. 562, p. 13.

Article 6) shall be taxable in the state in which the recipients carry on their employment.

"The income is actually produced in that State and the tax can easily be levied at the source.

"Nevertheless, special clauses may be inserted to meet the case of persons working in the vicinity of the frontier or engaged in any itinerent occupation, employment or trade.

"The second paragraph of Article 7 lays down that salaries of officials and public employees who are serving abroad shall be taxable in the state which pays these salaries.

"The fiscal régime for diplomatic or consular agents is, however, at the present the object of special studies which are being carried on in conjunction with the Committee of Jurists for the Progressive Codification of International Law."

§ 49. Article 8. Pensions.

PUBLIC OR PRIVATE PENSIONS SHALL BE TAXABLE IN THE STATE OF THE DEBTOR OF SUCH INCOME.

The same text had been adopted at London.[84] There developed, however, at Geneva considerable opposition to it, before it was finally approved. In order to illustrate accurately this conflict of views there follow statements taken from the speeches of the delegates who addressed themselves to the question of the taxation of pensions.[85]

Mr. Corbett: "A company carrying on business in the Union of South Africa had granted a pension to one of its employees. The pension, however, had been paid out of a trust fund constituted in a country outside the Union of South Africa and administered by trustees also not resident in the Union. In that case surely it should be the com-

[84] C. 216, p. 11.
[85] P. V. 7, pp. 17–20.

pany which should be responsible for the tax. The Government of the Union of South Africa had adopted the principle of the grantor of the pension as the decisive factor."

The Chairman: "Take the case of an industrial undertaking which had granted a pension to one of its employees. If the firm acted through a foreign insurance company, was the insurance company expected to pay the tax or the firm which was the actual debtor?"

Prof. Flores de Lemus: "Several foreign companies in Spain employ Spanish labor. During the period of their employment such Spanish workmen paid to the Spanish Government the tax on their wages. If, however, their pension were taxable in the country of origin, the tax would belong to that country and not to Spain, even though the workmen themselves might not have left the country."

The Chairman: "The tax should be paid in the country where the business was carried on. Whatever might be the nationality of the firm, therefore, that pension should be taxable in the country in which a man worked."

Prof. Flores de Lemus: "It might be stated in so many words that the old age pension would be taxable in the country in which the recipient had his domicile."

M. Borduge: "It would be sufficient to specify in the commentary that the country in which the undertaking was being operated was entitled to tax the pension."

Prof. Flores de Lemus: "It is difficult to say in which country a company performs its most extensive operations. In the same way, there are men who having worked in several countries return to their own country when the time comes for their retirement."

M. Borduge: "Men working in several different countries, as a general rule, would not be receiving any pension. But if there were a case of men working for an English company and a Spanish company and drawing a pension from each country, said pensions would be taxable, the one in Spain and the other in England."

The Chairman: "A subdivision of this article seems to be indicated as follows: To have public pensions taxed by the state paying them and to have private pensions taxed by the state in which the recipient resides."

The meeting then adjourned for lunch. When the afternoon session began the Chairman made a new proposal as follows:[86]

"In the special case of private pensions, the state of the debtor shall be the State in which the employment was exercised within the meaning of Article 7, or the state in which the persons concerned have subsequently taken up their residence."

Sir Percy Thompson: "It is usual in England in private enterprises to apply a system of pensions based upon a joint contribution from the employer and employee paid to an insurance company. . . . What would be done if the suggestion of the Chairman were adopted in the case of a person employed by an English firm working abroad who took up an insurance with a foreign company which had neither its headquarters nor a branch in the country in which he resided? How in that case would the tax on the pension be levied? It seems much more practical to levy the tax in the country in which the person pensioned is domi-

[86] P. V. 8, pp. 1–8. These quotations are merely excerpts from the speeches made.

ciled. Taxes on pensions should be included among personal taxes and not impersonal taxes. If, for example, a tax of 20 per cent was imposed on pensions, the small pensioners would be placed in a very difficult position. If on the contrary the principle were adopted of levying the tax on pensions in the country where the pensioner is domiciled, it would be possible to take the personal situation of the taxpayer into account."

The Chairman: "Suppose that two Spanish workmen had been insured, one by a Spanish company, the other by a foreign company. There might happen to be so large a difference in the rate of tax paid by these two workmen on the respective pensions, that a problem of an economic character might arise."

Dr. Bolaffi: "What would be the position of a person employed by an English firm which had branches in numerous countries? If an employee had worked in the various branches each country would be authorized to levy the tax on his pension?"

Prof. Flores de Lemus: "Would it not be more practical to state in the text of Article 8 that private pensions would be regarded as annuities and dealt with in accordance with Article 9?"

M. Blau: "Why should a pension by a private enterprise be taxed in the country where the person worked? Why should a pension paid by a state to one of its officials be taxed by the state even if the official had left the country? The tax should be paid to the state where the person pensioned took up his residence and where he enjoyed the advantages of civil life."

The Chairman: "These are questions of detail on which it is preferable not to lay stress."

Sir Percy Thompson: "Article 8 is absolutely impracticable. Take the case of an English bank,

for example, with numerous branches. Its employees would serve in various branches and thus pass from one country to another. All these employees would contribute to some central insurance fund situated in England. Could it be admitted that on their return, the country in which branch No. 4 or 5 was situated, should levy the tax on the pensions of these employees?''

Dr. Bainoff: ''I am in favor of adopting the pure and simple text of Article 8.''

The Chairman: ''Article 8 should be regarded as adopted.''

Prof. Adams: ''I regard Article 8 in its present form so contrary to the conditions prevailing in America that I should be very sorry to imperil my reputation as an expert by accepting it. As it is incapable of application, I cannot subscribe to the present draft.''

Sir Percy Thompson: ''Article 8 amounts to stating the pension paid by private firms would be taxed anywhere one pleased.''

At the suggestion of the Chairman, Sir Percy submitted an amendment to the text by suppressing the words ''or private,'' and to transfer the reference to private pensions to Article 9, in order to have something to vote for or against. The results of the balloting were: For the amendment 5, against the amendment 7, present but not voting 8, absent 7. The Chairman concluded that Article 8 had been adopted without amendment.[87]

§ 50. **Commentary on Article 8.** The officially approved commentary reads as follows:[88]

''This article provides that public or private pensions shall be taxable in the State of the debtor of such income.

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[87] P. V. 8, p. 8.
[88] C. 562, p. 13.

"It appeared both right and practical that all pensions should be made subject to the same rules.

"In the special cases of private pensions, however, the country of the debtor may be taken to be that in which the activity was carried on within the meaning of Article 7, or that in which the parties concerned subsequently established their domicile."

§ 51. Article 9. Annuities.

"ANNUITIES OR INCOME FROM OTHER SOURCES NOT REFERRED TO IN THE PREVIOUS PARAGRAPHS SHALL BE TAXABLE IN THE STATE OF FISCAL DOMICILE OF THE CREDITOR OF SUCH INCOME."

The revisers of the London text changed the word "claims" to "sources." But in the commentary this change was overlooked. The official minutes read: "Article 9 was adopted without observation." [89]

§ 52. Commentary on Article 9. Its commentary reads as follows; [90]

"Contrary to the above-mentioned provisions, annuities or income from other claims not referred to in the previous paragraphs shall be taxable in the state of fiscal domicile of the creditor of such income.

"The exception which is thus made for annuities is justified by the special nature of this form of income, since the recipient is free to select the country which is to be liable for the payment."

§ 53. Personal Taxes—Introduction. The previous section of Draft Convention I-a has dealt with impersonal taxes. They are "impersonal" in the sense that ordinari-

[89] P. V. 8, p. 9.
[90] C. 562, p. 13.

ly the government reaches out its arm and takes from certain kinds of income its share thereof irrespective of the person who otherwise would receive the whole payment. The plural form "taxes" is used because, as has been pointed out, what has been contemplated often includes a whole series of *impôts cédulaires.*

The second section of this draft convention is entitled "personal taxes." A brief consideration of the sense in which the experts ordinarily used the word "personal" will show that the term "the personal tax" would have been more accurate. The singular form is preferable because ordinarily one tax is imposed on an individual's entire income. It is true that in certain cases there may be a complexity of rates to consider, as in the British and American systems where both the normal tax and the surtax are generally held to be personal. The total sum due, however, is ordinarily viewed as one "personal" tax. The tax considered under this heading is personal rather than "impersonal" because the taxpayer himself personally, in most cases, renders an accounting to the government of the make-up of his total income. It is "personal" because the government takes into account certain of the following factors personal to each taxpayer—marital status, number, age, and physical condition of dependents, size of income, place of abode, length of residence, etc.

In rare cases it is possible, even when the personal tax is assessed only against residents, for two such taxes to be due, if no double taxation treaty is in effect. This will always be so if the courts of two states interpret residence in a particular case differently. It is, moreover, possible for a person to maintain residences at the same time in two or more different states. Dual residence is a factor to be considered. It is of at least equal importance in tax matters with dual citizenship.

§ 54. **Article 10. The Personal Tax.** At the London conference the Experts adopted the following as the first paragraph of Article 10:[91]

> "THE PERSONAL TAX ON THE TOTAL INCOME SHALL BE LEVIED BY THE STATE IN WHICH THE TAXPAYER HAS HIS FISCAL DOMICILE, i. e., HIS NORMAL RESIDENCE, THE TERM RESIDENCE BEING UNDERSTOOD TO MEAN A PERMANENT HOME."

This was approved at Geneva without discussion.[92]

The wording of the next paragraph of this Article which was approved at London began thus:

> "If the state of domicile does not impose impersonal taxes on its taxpayers domiciled therein, it shall deduct from its personal tax the lesser of the two following amounts. . . ."

At Geneva Sir Percy Thompson led the attack on this provision, pointing out in connection therewith three things.[93] In the first place, a serious obligation would be forced upon a country like Great Britain which "does not impose impersonal taxes" without any corresponding burden whatever being placed on countries like Belgium, France, and Italy. In the second place, the acceptance by Great Britain of a proposal of this sort would have to be in the nature of a *quid pro quo* to be determined by the British Parliament and not by an international conference of tax experts. In the third place, the slight concessions to the British contentions accepted at London in the matter of an alternative second paragraph to Article 3 had since been rejected at Geneva.

Dr. Damsté, Dr. Dorn, and Dr. Adams suggested certain changes for the clarification of the remainder of the London proposal which in turn tended to eliminate Sir

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[91] C. 216, p. 11.
[92] P. V. 11, p. 1.
[93] P. V. 11, pp. 2–3.

Percy Thompson's opposition. In the first place the provision was made absolute, not conditional. The beginning of paragraph 2 was changed to read:

§ 55. The Method of Deduction.

"THE STATE OF DOMICILE SHALL DEDUCT FROM ITS PERSONAL TAX THE LESSER OF THE TWO FOLLOWING AMOUNTS."

In other words, whether impersonal taxes are imposed or not, a deduction is to be made. But how much? On what basis? At London the Experts had said:[94]

"(a) Either the amount of the tax which would be levied exclusively on such part of the income as is taxed in the other contracting state; or

"(b) The amount of the tax paid in the said state, including the personal tax when for special reasons the state of origin has imposed such a tax on income from immovable property or from industrial, commercial or agricultural undertakings situated within its territory.

"These deductions shall not in total exceed x per cent of the total personal tax leviable in the state of domicile."

Instead of these exceptions and complications the General Meeting at Geneva favored the deduction of the lesser of the two following amounts:

"(a) EITHER THE AMOUNT OF THE TAX ACTUALLY PAID IN THE OTHER CONTRACTING STATE ON INCOME FROM IMMOVABLE PROPERTY (ARTICLE 2) AND ON INCOME FROM INDUSTRIAL, COMMERCIAL, OR AGRICULTURAL UNDERTAKING (ARTICLE 5); or

"(b) THE AMOUNT OF THE TAX RELATING TO THE INCOME REFERRED TO IN PARAGRAPH (a) AT THE RATES IN FORCE IN THE STATE OF DOMICILE

THIS DEDUCTION SHALL NOT EXCEED X PER CENT OF THE TOTAL PERSONAL TAX LEVIABLE IN THE STATE OF DOMICILE."

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[94] C. 216, p. 11.

§ 56. **Tax Relief Accomplished.** Here is the clearest statement thus far found of how double taxation is to be avoided. Subtract either the amount of the tax already paid to the other contracting state or the amount of the tax applicable to such income in effect in the state of domicile, whichever is smaller.

The discussion of this Article, the crux of the whole problem, consumed nearly two whole days.[95] It was natural that such should be the case since this Article was debated by delegates not only from states which distinguish between personal and impersonal taxes to which it was supposed to apply, but also by representatives of those governments whose fiscal systems make no such distinction. Moreover, this Article was discussed before the sub-committee charged with submitting a draft convention before this second group of states had submitted its report.[96] The existence of sharply conflicting views on certain of the matters under consideration had convinced representatives of certain states having widely variant income tax systems, that the meeting would have to consider a draft convention for the use of states one of which does, while the other does not, distinguish between personal and impersonal taxes.

The concluding paragraph of Article 10 adopted at Geneva is the same as the one approved in London except for the use of the words "the deduction" instead of the inaccurate "the deductions" found in the earlier draft. The wording is as follows:

> "WHEN THE STATE OF DOMICILE IMPOSES IMPERSONAL TAXES, THE DEDUCTION PROVIDED FOR ABOVE SHALL NOT INCLUDE IMPERSONAL TAXES WHICH CORRESPOND OR RELATE TO INCOME TAXED IN THE OTHER CONTRACTING STATE."

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[95] See especially P. V. 11, 12, and 13.
[96] P. V. 10, p. 1, and P. V. 12, p. 11.

If this were not so, it would be clearly to the advantage of an investor to buy foreign securities in preference to those of the country of his residence.

§ 57. **Commentary on Article 10.** The officially approved commentary on this Article is especially clear in showing in detail how the relief provided for is to be mathematically worked out. It follows:[97]

> "Under the terms of this article, the personal tax on total income is to be levied by the State in which the taxpayer has his fiscal domicile, i. e., his normal residence, the term 'residence' being understood to mean a permanent home.
>
> "This provision is of double import: it specifies the place at which the personal or general tax shall be levied and, further, gives a definition of fiscal domicile in terms which were discussed at great length and are those accepted by the majority of the existing codes of law.
>
> "The words 'permanent home' convey the idea of an establishment intended to last for some time. Even a person who stays at an hotel for several months may be considered as normally residing there. Moreover, a state is always free to tax any of its own nationals who would not be taxed because they are continually moving about.
>
> "Article 10 provides for a modification of the rule which it lays down.
>
> "In order to avoid double taxation, the state of domicile will make a deduction from its personal tax with regard to the income taxed in the country of origin. But what should be the amount of such deduction? It is to be limited to the lesser of the two following amounts, i. e.:
>
> "(a) Either the amount of the tax actually paid in the other contracting state on income from im-

[97] C. 562, pp. 13–14.

movable property (Article 2) and from industrial, commercial or agricultural undertakings (Article 5); or

"(b) The amount of the tax on the income referred to in paragraph (a) at the rates in force in the state of domicile.

"This deduction may not exceed x per cent [97a] of the total amount of the personal tax levied in the country of domicile.

"This restriction is designated to prevent a taxpayer whose whole income is derived from abroad from escaping all taxation in his country of domicile.

"The following example will explain the application of the system of deductions advocated by the experts: A taxpayer domiciled in state A draws a total income of 100,000 francs, 20,000 of which are derived from an industrial or commercial undertaking situated in state B, which, under this head, levies an impersonal tax of 4,000 francs.

"The tax in state A will be calculated on the total of the income (for instance, at the rate of 20 per cent), i. e., $\frac{100{,}000 \times 20}{100} = 20{,}000$ francs, but the fiscal authorities will deduct therefrom the sum of 4,000 francs mentioned above, so that the tax will be reduced to $20{,}000 - 4{,}000 = 16{,}000$ francs.

"If, however, in the state of domicile the tax only amounts to 3,000 francs on an income of 20,000 francs, 3,000 francs will be deducted and the tax will then be reduced to $20{,}000 - 3{,}000 = 17{,}000$ francs. A state will thus not suffer loss owing to the fact that its nationals engage in business in other states.

"The relief provided for above will be granted in particular in cases in which the state of domicile only levies a general income tax. If this gen-

[97a] The percentage is to be determined by the contracting parties.

eral tax is of a purely complementary nature, and is additional to impersonal taxes, there will be no need for relief, or at any rate such relief will have to be limited. For this reason, the last paragraph of Article 10 lays down that, if the state of domicile levies impersonal taxes, the deductions provided for under (a) or (b) in Article 10 shall not include the impersonal taxes corresponding or relating to the income taxes in the state of origin.

"The experts have further contemplated another method of avoiding double taxation. The tax in the state of domicile of the taxpayer would be calculated at the rate applicable to the whole of his income, but it would only be levied on that part of his income which is taxable in that country, that is to say, exclusive of the income taxed in the country of its origin. Thus a taxpayer domiciled in State A drawing a total income of 100,000 francs, 20,000 of which is derived from immovable property situated in state B, would only be taxed in State A on 80,000 francs, but at the rate applicable to 100,000 francs."

§ 58. Article 11. Dual Residence.

"IN THE CASE OF TAXPAYERS WHO POSSESS A FISCAL DOMICILE IN BOTH CONTRACTING STATES, THE PERSONAL TAX SHALL BE IMPOSED IN EACH OF THESE STATES IN PROPORTION TO THE PERIOD OF STAY DURING THE FISCAL YEAR, OR ACCORDING TO A DIVISION TO BE DETERMINED BY AGREEMENT BETWEEN THE COMPETENT ADMINISTRATIONS."

This is the text approved both at Geneva and London. The only discussion incident to the adoption of the foregoing was by the Chairman and Dr. Liubimov.[98] The Soviet delegate stated that in his experience he had found it impracticable "to propose that the personal tax should be imposed in two or more states in proportion to the

[98] P. V. 11, pp. 5, 6.

period of stay. He suggested that this tax should be levied either in the state where the person to be taxed had stayed longest, or in the state of which he was a national." The Chairman stated that the Belgian practice was to levy the tax in proportion to the amount of practice permitted by the Article and the commentary. Dr. Liubimov favored the use of some phrase other than "fiscal domicile," but he did not insist and the Article was adopted without change.

§ 59. **Commentary on Article 11.** The following commentary was approved:[99]

> "This article is designed to cover a special case, namely, that of taxpayers with a fiscal domicile in both contracting states. In this case, the tax will be imposed in each of these states in proportion to the period of stay during the fiscal year, or according to a division to be determined by agreement between the competent administrations, for instance, in proportion to the amount of income produced in each country. This clause might, if necessary, be applied to taxpayers who change their domicile during the fiscal year."

§ 60. **Miscellaneous Provisions.** Under this heading the delegates at Geneva, like the experts at London, voted to include certain administrative and other provisions in addition to an article dealing with the taxation of wealth as a fund, as distinct from income as a flow. This matter is covered by Article 12, which reads as follows:

§ 61. **Article 12. Taxes on Wealth.**

> "THE PRINCIPLES LAID DOWN IN THE PRECEDING ARTICLES SHALL BE APPLICABLE, *MUTATIS MUTANDIS* TO THE RECURRENT TAXES ON TOTAL WEALTH, CAPITAL, OR INCREMENTS OF TOTAL WEALTH, ACCORDING AS THESE TAXES ARE IMPERSONAL OR PERSONAL."

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[99] C. 562, p. 15.

The Soviet Government delegate's suggestion, that turnover taxes be specifically referred to, was not adopted.[100]

§ 62. **Commentary on Article 12.** The following commentary was adopted.[101]

> "Article 12 provides that the principles laid down in the preceding articles shall be applicable, *mutatis mutandis,* to the recurrent taxes on total wealth, capital or increments of total wealth, according as these taxes are impersonal or personal."
>
> "Succession duties form the subject of a separate convention.
>
> "As regards taxes of an exceptional nature, special agreements may have to be concluded, having due regard to the nature of these taxes.
>
> "The provision of Article 12 is, moreover, not compulsory, inasmuch as countries which conclude a convention will have the option of omitting this article."

§ 63. **Article 13. Administrative Measures.** There was no discussion over the adoption of Article 13 or its commentary. These follow:

> "AS REGARDS ANY SPECIAL PROVISIONS WHICH MAY BE NECESSARY TO ENABLE THE PRESENT CONVENTION TO BE APPLIED, MORE PARTICULARLY IN CASES NOT EXPRESSLY PROVIDED FOR, THE FINANCIAL ADMINISTRATIONS OF THE TWO CONTRACTING STATES SHALL CONFER TOGETHER AND TAKE THE MEASURES REQUIRED IN ACCORDANCE WITH THE SPIRIT OF THIS CONVENTION."

§ 64. **Commentary on Article 13.**

> "Any special provisions which may be necessary to enable the convention to be applied more par-

[100] P. V. 11, p. 8.
[101] C. 562, p. 15.

ticularly to cases not expressly provided for shall be settled by agreement between the financial administrations of the contracting states in accordance with the spirit of the convention.

"Article 13 is designed to give effect to this principle."

§ 65. Article 14. Adjudicating Disputes.

"SHOULD A DISPUTE ARISE BETWEEN THE CONTRACTING STATES AS TO THE INTERPRETATION OR APPLICATION OF THE PROVISIONS OF THE PRESENT CONVENTION, AND SHOULD SUCH DISPUTE NOT BE SETTLED EITHER DIRECTLY BETWEEN THE STATES OR BY THE EMPLOYMENT OF ANY OTHER MEANS OF REACHING AGREEMENT, THE DISPUTE MAY BE SUBMITTED, WITH A VIEW TO AN AMICABLE SETTLEMENT, TO SUCH TECHNICAL BODY AS THE COUNCIL OF THE LEAGUE OF NATIONS MAY APPOINT FOR THIS PURPOSE. THIS BODY WILL GIVE AN ADVISORY OPINION AFTER HEARING THE PARTIES AND ARRANGING A MEETING BETWEEN THEM IF NECESSARY.

"THE CONTRACTING STATES MAY AGREE, PRIOR TO THE OPENING OF SUCH PROCEDURE, TO REGARD THE ADVISORY OPINION GIVEN BY THE SAID BODY AS FINAL. IN THE ABSENCE OF SUCH AN AGREEMENT, THE OPINION SHALL NOT BE BINDING UPON THE CONTRACTING STATES UNLESS IT IS ACCEPTED BY BOTH, AND THEY SHALL BE FREE, AFTER RESORT TO SUCH PROCEDURE OR IN LIEU THEREOF, TO HAVE RECOURSE TO ANY ARBITRAL OR JUDICIAL PROCEDURE WHICH THEY MAY SELECT, INCLUDING REFERENCE TO THE PERMANENT COURT OF INTERNATIONAL JUSTICE AS REGARDS ANY MATTERS WHICH ARE WITHIN THE COMPETENCE OF THAT COURT UNDER ITS STATUTE.

"NEITHER THE OPENING OF THE PROCEDURE BEFORE THE BODY REFERRED TO ABOVE NOR THE OPINION WHICH IT DELIVERS SHALL IN ANY CASE INVOLVE THE SUSPENSION OF THE MEASURES COMPLAINED OF: THE SAME RULE SHALL APPLY IN THE EVENT OF PROCEEDINGS BEING TAKEN BEFORE THE PERMANENT COURT OF INTERNATIONAL JUSTICE, UNLESS THE COURT DECIDES OTHERWISE UNDER ARTICLE 41 OF ITS STATUTE."

§ 66. **Discussion of Article 14.** The only objection to the approval of this Article came from Dr. Liubimov, who stated that the Government of the U. S. S. R. was opposed to the inclusion in a draft convention of any reference to the League of Nations, since the draft was supposed to be availed of by states not members of the League. He proposed its deletion.[102]

On the contrary Dr. Adams, speaking as the representative of a nation also not a member of the League, said that he had studied very carefully the wording of Article 14. He considered that it required no commentary, that as it stood it was satisfactory. It did not force any nation to appeal to the League for a settlement of a dispute if one arose. "It was in effect," so the minutes read,[103] in summarizing Prof. Adams' remarks, "simply the generous offer of the good offices of the League, so as to bring about a friendly settlement of any dispute that might arise among the signatories. If M. Liubimov would read carefully the text of the Article, he would see that the League offered its assistance only as a last resort, failing various other means of settlement. There was no question of the authority of the League being imposed, simply that the League might be a medium of conciliation if other forms of conciliation proved inadequate. Prof. Adams said that he considered that the national sentiment of his country would be completely satisfied with the exceedingly tactful formula employed in League conventions. He thought, as one of the technical experts, he would not go far wrong in expressing the gratitude of the meeting to the League for their hospitality to non-member states."

Dr. Liubimov stated that he did not think it would be necessary to proceed to a vote on his proposed deletion of this Article.

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[102] P. V. 11, p. 9.
[103] P. V. 11, pp. 9–10.

The Chairman thanked the Soviet delegate for not insisting and the American delegate for the sentiments he had expressed, and then declared the Article adopted.

§ 67. Commentary on Article 14. The commentary reads as follows:[104]

> "There still remained to determine the procedure which should be followed in the event of a dispute as to the interpretation or application of the convention; this procedure is laid down in Article 14, which is based upon the text inserted in other international conventions, in particular the Convention for the Simplification of Customs Formalities signed at Geneva on November 3, 1923. It seemed advisable, however, to state that the Contracting States will have the option of accepting the opinion of the advisory body in advance."

§ 68. Concluding Remarks. With the adoption of Draft Convention I-a complete, the General Meeting took up the consideration of the alternative plans set forth in Draft Conventions I-b and I-c. They will be discussed in the next chapter.

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[104] C. 562, p. 15.

CHAPTER XII

DRAFT CONVENTIONS I-B AND I-C

§ 1. A Sub-Committee Is Formed.
§ 2. D. T. 136 Submitted.
§ 3. D. T. 141 Submitted.
§ 4. These Plans Compared.
§ 5. D. T. 139 Considered.
§ 6. D. T. 137 Discussed.
§ 7. Other Original Plans Submitted.
§ 8. The Genesis of Draft Conventions I-b and I-c.
§ 9. Similarities of Drafts I-b and I-c.
§ 10. Draft I-b and I-c Contrasted.
§ 11. Conclusions.

§ 1. A Sub-Committee Is Formed. At an early stage in the deliberations of the General Meeting it was recognized as desirable, or possibly absolutely necessary, to consider a draft convention which would be appropriate for use if one of the contracting states had a revenue system which did not classify income taxes as either personal or impersonal. A sub-committee was organized to consider this matter. At first its membership limits were vague, all interested delegates being invited to attend. Later on the American, British, French, and German representatives took the leading parts in its deliberations.

§ 2. D. T. 136 Submitted. By October 24 Sir Percy Thompson presented on behalf of the sub-committee its first specific recommendation to the General Meeting. It was circulated as D. T. 136 [1] and was entitled "Tenta-

[1] Mimeographed material circulated by the Secretariat, prepared by a delegate to the General Meeting and dealing with some matter connected with Double Taxation is known at Geneva as a D. T. D. T.'s are numbered, usually consecutively as they are issued.

tive Draft of a Similar Multilateral Convention to restrict Double Taxation in the Sphere of National Income Taxes." Three words in the title are worthy of special consideration, "similar," "multilateral," and "national." "National" is of importance because its inclusion limits the proposed treaty, so as to exclude from its provisions communal, provincial, or departmental levies. But why "similar"? Similar to what? And why multilateral when all the discussions had clearly been with regard to a bilateral agreement?

§ 3. **D. T. 141 Submitted.** The answer is that Dr. Adams had met with the other members of the American delegation on October 21, and had threshed out with them the arguments for and against a multilateral general draft treaty. That group decided to draw up, and actually did draw up, a simple convention wherein taxes were classified either as residence or source taxes. The idea was that if it were approved it would be available for the signatures of later appointed accredited [2] representatives of all states. At any rate it would serve as a basis of discussion. The actual scheme was not formally presented by Dr. Adams to the General Meeting until October 27, when it appeared as D. T. 141. Dr. Adams had, however, prior to October 24, discussed it in detail with Sir Percy Thompson. For that reason the latter called his own plan "a similar multilateral convention."

§ 4. **These Plans Compared.** The outstanding difference between the two plans may be thus summarized. The American expert had proposed that "income shall be taxable only by the state in which the taxpayer has his

[2] It is to be borne in mind that those attending the General Meeting were there in their capacity as experts and not as diplomats authorized to sign tax agreements on behalf of their governments.

fiscal domicile"[3] with five exceptions, and that relief was to be effected through a system of deductions and refunds. The British plan had set forth that three classes of income must be taxed only at the residence of the recipient, and stated general rules to apply for certain other categories of income.

§ 5. **D. T. 139 Considered.** M. Borduge on October 26 presented a simplified draft in the introduction to which he said, ". . . it appears to cover all cases. The list given in Article 1 is not restrictive and can be modified in order to meet the special conditions obtaining in the contracting states."[4] There was no specific statement as to whether it was to be construed as multilateral or bilateral in character. The plan was circulated as D. T. 139. Therein the emphasis is diametrically opposite that of D. T. 141. The American plan had asserted the right of the state of residence to tax all income with certain derogations noted on pages 2 and 3 thereof, while the French plan began with the following statement: "As regards the taxation of the classes of income enumerated hereafter, the high contracting parties shall recognize the right of priority of the state from which the income was derived." Then followed a classification of income and a statement for each class as to what one is to understand to be its state of origin. Article 2 provided that "the state in which the taxpayer has his fiscal domicile, . . . while it reserves the right to tax the same classes of income, agrees to take into consideration the tax levied in the state of origin in such a way that in the end the taxpayer shall not be taxed more heavily than would be the case if the tax on the whole of his income had been

[3] D. T. 141, p. 1.
[4] D. T. 139, p. 1.

imposed and collected in the state of domicile."[5] In other words the entire burden of preventing double taxation was to be carried by the state of the fiscal domicile of the taxpayer. There was the usual exception provided for as to the taxation of income from maritime shipping and air navigation companies only by the state wherein is located the real center of management.

§ 6. **D. T. 137 Discussed.** The day previous Professor Dorn had submitted the first plan for an essentially bilateral convention. Articles 2, 5, 6, 7, 8, 9, 13 and 14 of Draft Convention I-a were repeated in his plan, which was circulated as D. T. 137. It provided, however, that interest (except on mortgages) and dividends should be taxable by the state in whose territory the creditor had his fiscal domicile. Draft Convention I-a had declared that such interest was to be taxable only by the state in whose territory the debtor of such income was resident and dividends were to be taxed by the state in which the real center of management was located. In the German proposal, however, "When the other contracting state levies a tax, by means of deductions at the source, on income from capital originating within the territory of that state, the right to this taxation" (i. e., by deduction at the source) shall not be affected by the rule above stated about interest and dividends being taxed by the state in which the creditor of such income lives. In such a case "the state of domicile shall refrain from levying in addition to its direct tax, a special tax on income originating in the other contracting state." If double taxation still persisted it was provided that "the contracting states shall come to an agreement if necessary to allow the remission, in respect of the tax levied by the state of

[5] D. T. 139, p. 3.

domicile, of the whole or part of the tax deducted by the state of origin, or a refund, upon production of proper evidence by the state of origin, of the whole or part of the tax collected by it by means of deductions at the source."[6]

§ 7. **Other Original Plans Submitted.** Mr. Corbett submitted on the opening day of the Conference, October 22, suggestions for a draft convention for the prevention of double taxation suitable for use by a state whose system of taxes is similar to that of his country, the Union of South Africa. There is no impersonal tax under the laws of the Union, but the existing tax, sometimes termed a personal tax, envisages only a resident's total income from Union sources. It does not apply to a resident's income from foreign sources. Mr. Corbett's method of eliminating double taxation in such cases would be to add to Article 1 of Draft Convention I-a a paragraph reading:[7]

> "The rules relating to impersonal taxes as contained in Articles 2 to 9 of the convention shall be applicable to any such special tax on income imposed by a state of origin as is restricted to the taxation of income derived from sources within that state."

To Article 10, paragraph (b) he favored adding:

> "or any such special tax on income as is referred to in Article 1 of the convention."

Mr. Corbett pointed out the necessity for the Union of South Africa to maintain its present system of taxation—

[6] D. T. 137, p. 2.
[7] D. T. 132.

a position it shares with other young states in a similar stage of development.

Dr. Liubimov submitted the proposal of the Soviet Government. While it mentioned personal and impersonal taxes it provided *inter alia* for the inclusion of turnover taxes within the scope of the draft convention,[8] the granting of priority rights [9] in tax matters to exporting rather than to importing countries, and the elimination of Article 14 completely, so that there might not even be the possibility of the use of the League's good offices or a decision by the Permanent Court of International Justice in the event that the contracting states were unable to agree on the interpretation of the meaning of the treaty.

At a later date Dr. Liubimov proposed a plan which in certain aspects was similar to Mr. Corbett's. It reads as follows: [10]

> "The personal tax on the total income or on each source of income shall be levied by each of the contracting states on the income derived from sources situated in the respective states."

What was meant by a personal tax on each source of income was not explained. The Soviet expert, moreover, added provisions for supplementary taxes instead of emphasizing tax elimination. But when taxes were to be eliminated they were to be those which would "injure its (U. S. S. R.'s) interests" in the domain of the development of its foreign commerce.[11]

It is interesting that the Union of South Africa and the Soviet Union should have proposed schemes for

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[8] D. T. 133, pp. 2, 5.
[9] D. T. 133, pp. 7, 8.
[10] D. T. 140, p. 1.
[11] D. T. 133, p. 1.

relieving double taxation which have certain points in common but which are quite at variance with similar items in other tax systems.

§ 8. The Genesis of Draft Conventions I-b and I-c. The upshot of the presentation of the foregoing D. T.'s (see footnote page 229) was the decision of Sir Percy Thompson and Dr. Adams to coöperate in presenting a plan to be used by two countries in whose fiscal system taxation by reference to domicile predominates, and of M. Borduge and Dr. Dorn to coöperate in presenting a plan for use by two countries whose fiscal systems are essentially dissimilar. The two schemes resembled each other in that neither referred to taxes as either personal or impersonal. On October 26, there appeared the new Franco-German plan as D. T. 137 (1), and four days later the revised Anglo-American proposal as D. T. 148. In the meanwhile, however, there had been distributed among the delegates another draft, D. T. 144, described as an "unofficial suggestion." It was, however, the first text to be called Draft I-b by its author. Its style was later followed when the final approval of the General Meeting was given to the officially accepted I-b model. D. T.'s 137 (1) and 144 led definitely to the revised French proposal presented October 30, called D. T. 149, which with slight modifications was approved as Draft I-c. The revised Adams-Thompson plan likewise was with minor textual corrections approved as Draft I-b.

§ 9. Similarities of Drafts I-b and I-c. Both model conventions I-b and I-c begin with a statement reading as follows:[12]

> "The present convention is designed to prevent double taxation as regards the following specified

[12] All these quotations are from C. 562, pp. 16–21, inclusive.

taxes in the case of the taxpayers, whether nationals or otherwise (of the contracting states): (a) . . . (b) . . . (c) . . ."

Both provide

"The income from immovable property, i. e., that which corresponds to the actual or the presumed rental value of such property, as well as any other income from such property which is not covered by Article 3 [13] shall be taxable in the state in which the property in question is situated."

"This rule shall apply to income from mortgages and other similar obligations." [14]

In each draft one reads:

"Income from any industrial, commercial or agricultural undertaking, and from any other trades or professions not referred to in paragraph D,[15] shall be taxable in the state in which a permanent establishment is situated.

"The real centres of management, branches, mining and oil-fields, factories, workshops, agencies, warehouses, offices, depots, shall be regarded as permanent establishments. The fact that an undertaking has business dealings with a foreign country through a *bona fide* agent of independent status (broker, commission agent, etc.) shall not be held to mean that the undertaking in question has a permanent establishment in that country.

"Should the undertaking possess permanent establishments in both contracting states, each state shall impose the tax applicable to that part of the income produced in its territory. The competent administrations of the two contracting

[13] Draft I-b reads "paragraph B below."

[14] Draft I-b reads "similar claims."

[15] The wording in Draft I-c was intended to be "in Article 5" but a typographical error caused it to read "in Article 7."

states shall come to an arrangement as to the basis for apportionment.

"Nevertheless, income from maritime shipping and air navigation shall be taxable only in the state in which the real centre of management is situated."

There are the usual paragraphs found in each, reading:

"The fees of managers and directors of joint-stock companies shall be taxable in the state where the real centre of management of the undertaking is situated.

"Salaries, wages or other remuneration of any kind shall be taxable in the state in which the recipients carry on their employment.

"Salaries of officials and public employees who are serving abroad shall, however, be taxable in the state which pays these salaries.

Although a slight difference in phraseology is to be found both drafts agree that [16]

"In the case of taxpayers who possess a fiscal domicile in both contracting states, a tax collection of which under this convention depends on domicile [shall be] imposed in each of the contracting states in proportion to the period of stay during the fiscal year or according to a division to be determined by agreement between the competent administrations.

At the end of each proposal there are inserted provisions concerning special rules in special cases and ap-

[16] The words "shall be" were erroneously omitted in Draft I-b, Article I, paragraph A, after the word "tax"—C. 562, p. 16.

peals to some agreed-upon body to settle any dispute that arises as to the interpretation or application of any provisions of the convention. These are exactly like similar articles in Draft I-a.

§ 10. **Draft I-b and I-c Contrasted.** Draft Convention I-b asserts in Article 1a:

> "In principle, income shall be taxable by the state in which the taxpayer has his fiscal domicile, i. e., his normal residence, the term 'residence' being understood to mean a permanent home."

Not only does the other convention here being studied not so provide, but it does not even imply anything of similar import. There is therein no reference to the principle on which income (in its inclusive sense) ought to be taxed.

The next difference to note is that in Plan I-b, public pensions only are to be taxed by the state paying them, while under Plan I-c both public and private pensions are to be so taxed. In this connection the reader is referred to the arguments advanced pro and con, on the taxation of private pensions mentioned in the preceding chapter.[17]

The way in which double taxation is to be prevented under Draft I-b may be described as follows: Assume the case of a resident of Imeria who has a total income of $100,000 of which $40,000 is from Moranian sources, that the Imerian tax on $100,000 is $20,000, that the Moranian tax on $40,000 is $10,000. Now we are told that Imeria is to deduct from $40,000 either the tax imposed by Morania on income from Moranian sources or an "amount which represents the same proportion of

[17] Pp. 211–215.

the tax payable on the total income as the income taxable by priority [18] bears to the total income," whichever is smaller.

In the first case the amount would be $10,000. In the second, it would be the same proportion of $20,000 as $40,000 is to $100,000, which would be $8,000. Therefore, Imeria would deduct $8,000 from the otherwise due $20,000. That taxpayer's total taxes due would be paid, therefore, $12,000 to Imeria and $10,000 to Morania.

It is further provided that if Morania has collected an origin tax on revenues not enumerated as properly taxable by her under the treaty, Morania shall refund the amount on the production of the proper evidence.

Article 7 of Draft I-c sets forth how it would prevent double taxation. It reads: [19]

> "The income from movable assets shall be taxable in the state in whose territory the creditor has his fiscal domicile, i. e., his normal residence, the term 'residence' being understood to mean a permanent home.
>
> "When the other contracting state levies a tax, by means of deductions at the source, on income from capital originating in the territory of that state, the right to this taxation shall not be affected by the rule in sub-paragraph I. In this case the state of domicile which, in addition to its ordinary direct tax, levies a special tax on income originating in the other state, shall refrain from levying that tax or shall deduct therefrom the tax paid in the other state.

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[18] The phrase "taxable by priority" means taxable by the country of origin as specified above, and is applicable to income from immovable property, mortgages, industrial, commercial, or agricultural income, fees of managers and directors, salaries and wages and public pensions.

[19] C. 562, p. 20.

> "In order to avoid or to mitigate the effects of such double taxation as is not, under the various fiscal systems, prevented by the provision of the previous sub-paragraph, the contracting states shall come to an agreement, if necessary, to allow either the remission, in respect of the tax levied by the state of domicile, of the whole or part of the tax deducted by the state of origin, or a refund, upon production of proper evidence by the state of origin, of the whole or part of the tax collected by it by means of deductions."

The first thing to note is that income from transferable securities [20] is to be taxed by the state in which the recipient of such income resides. This is a complete reversal of the position taken in Draft I-a but is entirely in harmony with Draft I-b. The debates on this point when Draft I-a was being discussed were the sharpest of all those occurring during the deliberations of the delegates.

The second thing to note is that a reversal of the position just stated is authorized when "the other contracting state levies a tax, by means of deduction at the source, on income from capital originating in the territory of that state." In such a case Imeria has certain additional obligations imposed on her. She must refrain from levying a special tax on income from Moranian sources or she must deduct the Moranian tax.

In the third place the final solution of the problem is to be found in an agreement either to remit or refund a tax either wholly or partially.

Article 8 of model I-c states that annuities and income from any source not otherwise mentioned in the treaty

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[20] "Movable assets" is the expression used in the text. An exception is to be noted in the case of mortgages because they are secured by "immovable property."

shall be taxable by the state of the recipient's fiscal domicile. Draft I-b did not have to contain such a statement, because it provided that automatically all income should be so taxed except as derogations were specifically mentioned. Such was not the case, however, with Draft I-c, and had a provision not been made for the taxation of other income endless uncertainties might easily be imagined.

§ 11. **Conclusions.** An evaluation of the drafts studied is postponed to the final chapter, where a summary is furnished as to conclusions of the writer relative to these model conventions and other subjects.

CHAPTER XIII

WORK OF THE FISCAL COMMITTEE

§ 1. Introduction.
§ 2. Correction of an Error.
§ 3. Studies Decided On.
§ 4. Autonomous Agent and Permanent Establishment.
§ 5. Income from Patents and Authors' Rights.
§ 6. Apportionment Problems.
§ 7. Most-Favored-Nation Clause and Reciprocity.
§ 8. Conclusions.

§ 1. Introduction. Since the General Meeting held in Geneva in October 1928, plans for the "future organization" there discussed have made significant progress. The Council of the League approved the creation of a Fiscal Committee. Its members are, in the main, persons who represented their respective governments at the General Meeting.[1] This committee has held two sessions, the first from October 17 to 26, 1929, the second from May 22 to 31, 1930, both at Geneva. Reports of these two sessions have been published as Documents C. 516, M. 175. 1929. II and C. 340. M. 140. 1930 II.

In the following pages of this chapter there will be briefly outlined the results of the deliberations of that committee as evidenced by its published reports, with such comments as seem pertinent to the present study.

§ 2. Correction of an Error. At the outset one reads that the Fiscal Committee notes [2] that since the General Meeting of Government Experts held in Geneva in

[1] C. 516, p. 2, and C. 340, p. 3.
[2] C. 516, p. 2.

October 1928, a number of international agreements have been concluded for the prevention of double taxation in its widest sense. In the first place, there is cited the convention concluded on May 12, 1929, between Hungary and Poland, which deals with direct taxation, *in rem* and *in personam,* a convention said to be chiefly based on the system laid down in Draft Convention I-a of 1928, etc. This claim by the Fiscal Committee is erroneous. The date when that agreement was entered into was May 12, 1928, not May 12, 1929.[3] It could not possibly, therefore, have been based on Draft Convention I-a, which was not approved until October 30, 1928. What is probable is that the Hungarian and Polish officials were influenced by the model convention drawn up in London in April, 1927.

§ 3. **Studies Decided On.** Among other things the committee placed upon its agenda the study of six problems. These were, first, the definition of the terms "autonomous agent" and "permanent establishment"; second, the measures to be taken to avoid the double taxation of income derived from patents and authors' rights; third, rules for the apportionment of profits and capital of industrial or commercial enterprises operating in several countries; fourth, measures to prevent the double taxation of international trusts and holding companies in whose portfolios there are large amounts of transferable securities; fifth, the question of reciprocity in double taxation treaties in relation to the principle of most-favored-nation treatment, and sixth, the possibility of concluding certain types of multilateral tax treaties.[4]

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[3] Above, p. 127. The writer verified this date correction by examining official copies of the original Polish and Hungarian documents. Moreover, M. Zaleski of Poland referred at the General Meeting to the previously-signed Polish-Hungarian Treaty.

[4] C. 516, p. 3 and C. 340, pp. 4–8.

The committee decided also to investigate other matters which seem either to be outside the scope of our theme or but slightly related to it.[5] For that reason our subsequent references will be to the six items above mentioned.

§ 4. Autonomous Agent and Permanent Establishment. "Autonomous Agent" is the term substituted for the more elaborate "*bona fide* agent of independent status" found in the draft conventions. It more nearly corresponds to the French term used in those conventions "*un agent vraiment autonome.*" The committee decided that "agent" was to be understood in its "broadest commercial sense rather than in the strict legal sense."[6] It defined the relationship of "agent" to "permanent establishment" in the following language:[7]

> "When a foreign enterprise regularly has business relations in a country through an agent established there who is authorized to act on its behalf, it shall be deemed to have a permanent establishment in that country.
>
> "A permanent establishment will thus exist when the agent, being established in the country,
>
> "(a) Is a duly accredited agent who habitually enters into contracts on behalf of the enterprise for which he writes;
>
> "(b) Is bound by an employment contract and habitually transacts commercial business on behalf of the enterprise in return for remuneration from the enterprise.
>
> "(c) Is habitually in possession, for the purposes of sale, of a depot or a stock of goods belonging to the enterprise."

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[5] Such as turnover taxes, stamp duties, etc., foreign motor vehicles taxes, the treatment of foreigners, customs duties and fiscal charges applicable to newspapers.

[6] C. 516, p. 2, and C. 340, p. 4.

[7] C. 340, p. 4.

§ 5. **Income from Patents and Authors' Rights.** The Fiscal Committee decided that before it could recommend how income from authors' and inventors' rights should be taxed under the draft conventions it would be necessary to find out the present practice of governments in this matter. To this end questionnaires were sent. The replies received from the corresponding members of the committee showed four aspects to the problem. The committee's conclusions on this matter on first reading may be summarized as follows:[8]

(a) Fees collected by the author or inventor are almost everywhere treated as professional income. In the international field such income should therefore be taxed by the state of one's residence unless he maintains a permanent establishment abroad.

(b) Fees collected by the heirs or assigns of an author or inventor are treated by some countries as professional income, by others as income from movable capital. In the international field such income, under either interpretation should therefore be taxed by the state of residence of the heir or assigns of such income.

(c) Copyright or patent fees collected by grantees are invariably treated as industrial or commercial income. In the international field, therefore, such income should be taxed according to principle laid down for taxing income from industrial or commercial sources, that is, according to where the real center of management of the business is. Of course, apportionment would result if a permanent establishment exists in some other country.

(d) A person or body especially entrusted with the collection of authors' or inventors' fees should

[8] Ibid., pp. 5–7.

be taxable only on his or its income from such services and only by the state in which he or it carries on such business.

§ 6. **Apportionment Problems.** Apportionment problems, the Fiscal Committee realized, were of two sorts,[9] those that relate to "undertakings operating in several countries" and "measures designed to avoid double taxation of international trusts and holding companies." An investigation of the prevailing practice by the various nations was authorized at the first session, the replies were considered at the second, and a decision was reached to have a sub-committee continue to study these important subjects and to report thereon at the next session.

§ 7. **Most-Favored-Nation Clause and Reciprocity.** The conclusions reached by the committee on the relationship between the question of reciprocity in tax matters and the principle of the most-favored-nation clause were as follows:[10]

> "In view of the fact that the bilateral or multilateral agreements on double taxation are based on the principle of reciprocity, that is to say, involve reciprocal treatment for the nationals of the contracting parties, the Fiscal Committee, while not wishing to give an opinion on an exceedingly difficult point of international law, considers that the application of the most-favored-nation clause to the nationals of a country which had not acceded to the said agreements would constitute a treatment of those nationals contrary to equity and to the spirit of the clause.

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[9] C. 516, pp. 4–5, and C. 340, p. 5.
[10] C. 340, p. 7.

"Nevertheless, in order to prevent this point from arising, it is desirable that in commercial or establishment treaties concluded in the future it should be made clear that the most-favored-nation clause in its application to fiscal matters does not extend to special provisions for the avoidance of double taxation."

§ 8. **Conclusions.** It must be apparent that the Fiscal Committee has begun its work with a fine feeling of its opportunity to render worthwhile service in clarifying some of the difficult subjects pertinent to the international double taxation of income, and that its accomplishments to date only point the way to its continued usefulness.

CHAPTER XIV

THE AMERICAN GOVERNMENT'S ATTITUDE TOWARD DOUBLE TAXATION

§ 1. Introduction.
§ 2. The Revenue Act of 1928.
§ 3. Exclusions from Gross Income.
§ 4. Earned Income from Sources Without the United States.
§ 5. Income of Foreign Governments, Ambassadors, Ministers, and Consuls.
§ 6. China-Trade-Act Corporations.
§ 7. Reciprocal Shipping Exemption.
§ 8. Credit for Income Taxes Paid to Foreign Countries and Possessions of the United States.
§ 9. Normal Tax Credits.
§ 10. Is the American Normal Tax Personal?
§ 11. Is the American Surtax Personal?
§ 12. Foreign Corporations.
§ 13. Income from Sources Within Possessions of the United States.
§ 14. The Ways and Means Committee Hearings.
§ 15. Primary Purposes of "Bill H. R. 10165."
§ 16. The Reasoning Behind the Bill.
§ 17. Why Did the Bill Fail?

§ 1. Introduction. Interest on the part of the Government of the United States toward double taxation has been evidenced in four ways. First, there are in the income tax law many provisions bearing on this subject. Certain of these will be discussed in what follows. Secondly, there has been official coöperation between the American Government and the League since April, 1927, in the attempts of the technical experts and the government experts to draft model conventions to eliminate double taxation in various spheres. In the third place, there have been diplomatic negotiations during the past

two years between the American and French Governments with regard to the double taxation of American corporations transacting business in France through branches or affiliated companies, and of American citizens residing there. And lastly, there were held hearings by the Committee on Ways and Means of the House of Representatives on February 28 and March 1, 1930, on "a bill to reduce international double taxation."

§ 2. **The Revenue Act of 1928.** Regulation 74 relating to the income tax under the Revenue Act of 1928 contain Articles numbered from 1 to 1374. Some of these bear on the double taxation of income at least potentially, others bear on it directly, while still others specify conditions to prevent or reduce it, either absolutely or on the basis of reciprocity. Since even an adequate statement and explanation of all such Articles might easily run into fifty or sixty pages, the plan followed in the next few pages is to present only a few salient facts.

§ 3. **Exclusions from Gross Income.** The first of these facts is that while net income is defined, broadly speaking, as gross income less deductions,[1] one must note that gross income is a statutory concept. It does not include all one's income for it expressly excludes certain items.[2] Mention is made here only of earned income from sources without the United States[3] and the income of foreign governments.

§ 4. **Earned Income from Sources Without the United States.** The law states that there shall be exempt from income tax in "the case of an individual citizen of the

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[1] All references in this chapter to the Revenue Act of 1928 are to sections thereof, and are indicated by "Sec." All reference to Regulations 74 are to Articles thereof and are indicated by "Art."

[2] Sec. 22(b).

[3] "to the extent provided in section 116."

United States, a *bona fide* nonresident of the United States for more than six months during the taxable year, amounts received from sources without the United States if such amounts constitute earned income as defined in section 31. . . ."[4] Section 119 (c) generously defines "income from sources without the United States" as meaning, in the case of earned income, "compensation for labor or personal services performed without the United States." In other words an employee of the United States Steel Corporation residing in Germany at least six months in one taxable year, although he might be paid directly from New York, would be held to receive his compensation from a source outside of the United States because the recipient was not resident of the United States (although an American citizen) and because the payment was made for services rendered.

§ 5. Income of Foreign Governments, Ambassadors, Ministers, and Consuls. The exemption of the income received by a foreign government from its own investments in the United States in stocks, bonds, or other domestic securities, or from interest paid it on its bank deposits is provided for by law.[5] The exemption from the tax has been extended in accordance with principles of international comity, to income of certain foreign officials, as shown by the following regulations:[6]

> "Ambassadors and ministers accredited to the United States and the members of their households (including secretaries, attachés, and servants) who are not citizens of the United States, are exempt from the payment of federal income tax upon their salaries, fees, or wages. The in-

[4] Sec. 116(a).
[5] Sec. 116(c).
[6] Art. 641.

come from investments in the United States in bonds and stocks and from interest on bank balances received by ambassadors and ministers accredited to the United States, who are not citizens of the United States, is exempt from tax, but income from any business carried on by them in the United States is taxable. These provisions are also applicable to the wives and minor children of foreign ambassadors and ministers and the members of their households, including secretaries, attachés, and servants.

"All foreign consular officers and employees in foreign consulates in the United States who are nationals of the states appointing them are exempt from federal income tax with respect to wages, fees, and salaries received by them in compensation for their consular services, provided the appointing state grants a similar exemption to citizens of the United States who are American consular officers or employees of the American consulates in such state. The income received by foreign consular officers and employees of foreign consulates from investments in the United States in bonds and stocks and from interest on bank balances as well as income from any business carried on by them in the United States is subject to federal income tax."

An American citizen, however, would be taxable on compensation paid him by a foreign government, unless he were resident outside the territorial limits of the United States for at least six months during the taxable year.

§ 6. **China-Trade-Act Corporations.** Numerous special provisions are found in the law and regulations dealing with corporations (and dividends on their stock) organized under the China Trade Act of 1922. The pri-

mary purpose of these rules is to eliminate double taxation.[7]

§ 7. Reciprocal Shipping Exemption. Numerous references herein have already been made to the reciprocal maritime shipping exemption first introduced into American tax law in the Revenue Act of 1921. It is provided for in the current law under sections 212 and 231.

§ 8. Credit for Income Taxes Paid to Foreign Countries and Possessions of the United States. An American citizen or a domestic corporation is permitted to deduct from the tax otherwise due the American Government whatever is paid as income, war-profits, or excess-profits tax to a foreign government or to a possession of the United States.[8] Such a taxpayer is not permitted to deduct, however, as a credit against his or its American income more than an amount expressed by the following proportion: Credit for foreign or U. S. possessions tax is to the total American tax otherwise due as the foreign taxable income is to the total income. Any excess, instead of being lost to an American citizen or a domestic corporation, may be claimed as an additional tax deductible from gross income.[9] An illustration may clarify this rather complex legal provision.

The Ballinger-Wiltbank Company is a Pennsylvania corporation. Its 1930 net income from all sources was $100,000. Its American tax at 12 per cent would therefore be $12,000. Its net income taxed in Morania was $40,000. The rate was 20 per cent. Its Moranian tax was therefore $8,000. Now its credit would be computed first, as the same proportion of $12,000 as $40,000 is to $100,000, or $4,800.

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[7] Secs. 22, 23, 131, 141, 142, and 261–264, and Arts. 1151–1154.
[8] Sec. 131(a).
[9] Sec. 131(b).

The Ballinger-Wiltbank Company would next recompute its net income by subtracting from $100,000 the difference between $8,000 and $4,800 or $3,200. The adjusted net income would thus become $96,800. The tax at 12 per cent would be $11,616.00, the credit would be $4,800, and the tax due the American Government $6,816.00.

An alien resident of the United States is entitled to a similar credit to that granted a citizen provided that his country allows corresponding treatment to Americans resident therein. Under this provision of law nationals of Australia, Austria, Bulgaria, Canada, Italy, Netherlands, Newfoundland, and Salvador resident in the United States are placed on the same tax footing as Americans.[10]

§ 9. **Normal Tax Credits.** Credits against net income for normal tax purposes with which double taxation is concerned are of two sorts. The first is applicable to dividends from a foreign corporation which for the three previous years has received at least half its income from American sources.[11] The second relates to the personal exemption and credit for dependents. For citizens, wherever resident, and alien residents of the United States a personal exemption of $3,500 is granted to a married person living with husband or wife, or to the head of a family, and $1,500 to other persons.[12] To Canadians and Mexicans who are non-residents and who also receive compensation for services rendered in the United States, the same treatment may be accorded as to residents.[13] For all other nonresident aliens, however,

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[10] Art. 695(a).
[11] Sec. 25(a)(2).
[12] Arts. 12, 13, and 291(b).
[13] Sec. 214.

the only exemption granted is $1,500 and the normal tax is a flat 5 per cent.

Assume the case of two nonresident alien engineers employed by an American firm on some undertaking near the border between the United States and Canada, the one an Englishman, the other a Canadian, each married and each having two small dependent children, and each receiving a salary of $10,000. The Englishman's tax would be 5 per cent of $8,500 ($10,000 less $1,500) or $425.00. The Canadian's would be computed as follows: $10,000 less the personal exemption, $3,500, and credit for dependents, $800, is $5,700; since the first $4,000 is taxable at 1½ per cent, and the balance at 3 per cent, the total tax would be $111.00.

§ 10. **Is the American Normal Tax Personal?** So far as a citizen or resident of the United States is concerned there is no withholding at the source except in connection with certain bond interest, and then only if he signs a statement directing that it be done. To compute his normal tax he takes into account the kinds of income he has received. Dividends from domestic corporations and all Liberty Bond interest are free from the normal tax. He takes into account his personal or family status. His normal tax is purely personal to him. The normal tax of a person whose income is $15,000 can run anywhere from nothing to a rather high figure.

Now take the case of a nonresident alien individual. There is withholding at the source on all his income from American sources. His tax begins to look as if it were wholly impersonal. But not so, for in case he cares to claim deductions and credits he may do so by filing a return [14] and then his normal tax becomes personal, in one commonly understood use of the word.

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[14] Art. 1071.

§ 11. **Is the American Surtax Personal?** The American surtax is personal for citizens and residents of the United States, in the sense that they are required to report personally their total income from all except tax exempt sources and to pay a tax the rate of which increases as brackets of income increase.[15] It is impersonal in the sense that for a given amount of net income the surtax is the same, irrespective of the marital and family status of the taxpayer. In most of the foreign fiscal systems studied such has not been the case.

On the other hand a nonresident alien, not being under the jurisdiction of the United States, cannot be legally required to file a tax return. If he voluntarily does so, his tax (including surtax if one is due) is computed after taking into account the appropriate deductions and credits. If no return is filed, the Commissioner may cause a computation to be made of such nonresident alien's total income from American sources and assess the surtax found to be due. In that case gross and not net income is the basis used. The tax may be collected from any person having charge of sufficient of such alien's funds to be able to pay the tax therefrom. Certainly such a tax system is neither truly personal nor impersonal.

§ 12. **Foreign Corporations.** In general foreign corporations are subject to tax on their net income from sources within the United States.[16] If they fail to cause a return to be filed for them, however, the tax is assessed on gross income from American sources.[17] The special rule concerning shipping already cited is applicable to such income whether received by a foreign corporation or a nonresident alien individual.

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[15] An exception is provided in the case of the sale of mines and oil or gas wells. See Sec. 12b.

[16] Secs. 231(a) and 232.

[17] Sec. 233.

§ 13. Income from Sources Within Possessions of the United States. Special rules looking toward an alleviation of the burden of double taxation are applicable to income received from sources within Porto Rico, the Philippine Islands, the Panama Canal Zone, Guam, Tutuila, Wake and Palmyra.[18]

The foregoing statements relative to the Revenue Act of 1928 indicate the more important provisions bearing on double taxation relief existing in the legislation of this country at the present time.

Mention was made in the beginning of this chapter of four ways in which the American Government has shown its interest in the problem here considered. One has now been outlined. The second was the way in which cooperation with the League's experts had manifested itself. That theme having run largely all the way through this book further elaboration in this place is certainly not essential. The third way was by diplomatic negotiations with France. The results of those parleys have not yet been officially announced. In them the American point of view has been presented by Prof. Adams or Mr. Alvord, and certain intimations as to the official French attitude may be found in Prof. Adams' testimony on March 1, 1930, before the Ways and Means Committee.[19]

§ 14. The Ways and Means Committee Hearings. There was introduced into the House of Representatives during its Second Session a bill, H. R. 10165, to reduce international double taxation. Hearings were arranged for and held on February 28 and March 1, 1930. This bill was sponsored by the Treasury Department,[20] and

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[18] Secs. 251–252, and Arts. 1131–1134.

[19] Hearings, pp. 34, 36, 45, and especially 46.

[20] See letter from A. W. Mellon, Secretary of the Treasury, to Willis C. Hawley, Chairman of the Committee on Ways and Means,

embodied the principles of draft convention I-b, discussed in Chapter XII.[21] It provided, however, that the exemption of certain items of income receivable by nonresidents from American tax should be contingent upon reciprocal arrangements by other governments correspondingly to exempt Americans from certain source taxes.

The report on the hearings brings out many items of information not before available to the public or not presented previously so clearly. A summary of the more important elements in the discussions before the Committee of the House of Representatives on Ways and Means concerning this bill follow.

§ 15. **Primary Purposes of "Bill H. R. 10165."** The bill has three principal purposes.[22] These were, first, to transfer to other countries a part of the burden now being borne by the American Treasury under its present system of crediting foreign taxes against the Federal tax, secondly, to free nonresidents and foreign corporations from Federal tax on interest and dividends (and certain less important items of income) from American sources in return for the exemption by foreign governments of residents of the United States and American corporations from tax on such items from foreign sources, and lastly, "to secure for United States citizens and corporations various advantages similar to those which a number of important European Governments have granted their respective taxpayers in reciprocal understandings."

House of Representatives, dated February 18, 1930, published in Hearings, pp. 2–4.

[21] The text of this bill is reproduced on pp. 273–276 as Appendix C and the text of Draft Convention No. I-b on pp. 277–280 as Appendix D.

[22] Hearings, p. 3. The bill itself is placed in this book as Appendix C.

§ 16. The Reasoning Behind the Bill. In 1927 American citizens and corporations were allowed credits for foreign taxes paid to the extent of $26,534,807.[23] This huge sum, however, does not represent full relief, for the American tax law limits the credit to an amount equal to the American rate. It happens that since foreign rates are higher than those in effect here, the brunt of the burden of avoidance of double taxation is on the United States Treasury. No other nation employs so generous a scheme.

It appears, moreover, that investments by foreigners in securities of American corporations yield them an annual income of approximately 252 to 275 millions of dollars in comparison with a sum of 817 to 900 millions received by Americans from corresponding foreign investments. The reciprocal exemptions (contemplated as ultimately to be in effect and not immediately) would work to release Americans from the imposition of source taxes on the totals mentioned, and at the same time free the foreigner from having to pay the much smaller American tax on such items. In addition the difficulties of collecting the tax from nonresidents is very great; our rates are low and the sums received from such sources in any one year are small indeed. The 1928 items of such taxes collected by the Federal Government were as follows: On bond interest $900,326; all other interest subject to withholding $275,450; compensation for all personal services in the United States $140,373; patent and copyright royalties $590,515; annuities $2,629; private pensions $777; miscellaneous $314,255; dividends, at source, nothing. Dividends paid to nonresident aliens totaled $5,426,420, on which surtaxes were due but apparently uncollectible. Foreigners voluntarily, however, paid additional taxes to the Federal Government, not

[23] Ibid., p. 5.

withheld at the source, amounting to $2,667,660.82. Foreign corporations paid $3,597,753, making a grand total of $8,489,739.13.[24]

Over against this total must be set the allowances made the previous year as credits for foreign taxes paid, $26,534.807.

Most important probably of all the reasons why such a bill should have had favorable consideration was that related to the question of treaty-making power. Mr. Mills, undersecretary of the Treasury, pointed out that the American tariff position was to enact actual rates in customs laws, except for a maximum and minimum variation, but the American policy had been against bargaining tariff treaties. This bill, he said, applied the same principle to income tax relief by setting up a model which other nations could get the benefit of by enacting similar legislation.[25] That they would do so gradually was the belief of Prof. Adams, who added that Great Britain, the Irish Free State, Switzerland, Holland, and possibly France, Germany, and two or three Scandinavian countries were the states most likely to cooperate with the United States in this matter.[26] Such a consummation would mean that the Treasury would not be vexed with the innumerable intricacies if treaties had to be negotiated with each separate country, for they would result from bargainings and political considerations and not economic principles.

§ 17. **Why Did the Bill Fail?** Then why did the bill fail? The reasons were threefold. In the first place, at an earlier date in the same congressional session an agreement had been made by Mr. Mellon and the Com-

[24] Ibid., pp. 3, 6, 7, and 28.
[25] Ibid., pp. 11, 12.
[26] Ibid., p. 45.

mittee on Ways and Means not to ask for further tax reductions or rate adjustments that session. This was construed by Mr. Garner as excluding the bill then being considered, for its purpose was "to reduce international double taxation." In the second place, the question had not been brought before the public in such a way as to get any substantial public opinion behind it or brought to the attention of the committee with sufficient supporting data, i. e., as to the complexity of other methods, or the treaties already in effect, or the existing provisions for reciprocal treatment in certain foreign laws. Finally the Committee on Ways and Means was loaded down with work because of the fight then being waged on its tariff bill.

CHAPTER XV

CONCLUSIONS

§ 1. Summary.
§ 2. Concerning a General Multilateral Treaty.
§ 3. Concerning Future Studies by the Fiscal Committee.
§ 4. Concerning Special Multilateral Treaties.
§ 5. Concerning the Most-Favored-Nation Problem.
§ 6. Concerning the Responsibility of Fiscal Administrations.
§ 7. Concerning Optional Practices in Model Treaties.
§ 8. Concerning Certain Public Officers and Public Employees.
§ 9. Concerning the Taxation of Nonresident American Citizens.
§ 10. Concerning the American Program.

§ 1. Summary. In the previous chapters there has been traced the history of a movement. It has been the movement to seek some means of reducing the burdens of international double taxation of income by reciprocal agreements, legislative or administrative. No attempt has been made to delve into ancient or mediaeval records as to when considerations of a related kind first occupied the thoughts of statesmen. Instead the movement herein discussed has been overwhelmingly a post-World-War consideration. Its genesis was due to the decision of business to find world markets and of governments to finance their needs in large measure by huge increases in taxes on "income from whatever source derived."

This study has led to certain definite conclusions.

§ 2. Concerning a General Multilateral Treaty. The first of these is that a general multilateral treaty while desirable is impractical. Even the Succession States of the old Austro-Hungarian Empire could not put such a

plan into force with Italy, though for a time it looked as if that effort might succeed. And those countries of northern Europe whose tax systems have much in common seem to have so many variations of fundamentals as to make such a treaty impossible. The fiscal needs of the various nations are so diverse that no one system of bringing about the abolition of double taxation is feasible. The deliberations of the economists, technical experts, and governmental experts all seem to support this view.

§ 3. **Concerning Future Studies by the Fiscal Committee.** The second conclusion is that in order to be a force in moulding public opinion or bringing pressure effectively to bear on national legislation, the Fiscal Committee must continue to work for the solution of the problems it has already started to consider and to add to its list appropriate subjects from time to time. For example, it ought to work out, if such can be done, a plan for a simpler nomenclature in tax matters. Along this line may be suggested the problem presented by the confused use of the term "personal." A study should be made as to the treatment of subsidiary companies as contrasted with branches, of *surcursales, filiales,* and *sociétés affiliées.* A study should be made of the implications of the words "residence" and "domicile." There should be a comprehensive survey of court decisions in the different countries as to the meaning of "doing business" therein and therewith, and as to the differences between the two.

§ 4. **Concerning Special Multilateral Treaties.** The third conclusion is that the Fiscal Committee should draft a series of multilateral treaties dealing with one or two matters each. This plan is favored so that many states may be induced to sign, whereas opposition would surely be encountered in the case of a general convention. Pro-

visions for the taxation of the following items seem appropriate for inclusion in such a series of agreements: the income of maritime shipping and air navigation concerns, rents from real estate and interest on mortgages, salaries of public officials, professional fees and other kindred subjects.

§ 5. **Concerning the Most-Favored-Nation Problem.** The fourth conclusion is that the doubt about the applicability of the most-favored-nation clause in certain treaties to the nationals of third parties, states not signatory to a double taxation convention, ought to be eliminated at as early a date as possible. To this end it is suggested that the Fiscal Committee take steps to have the subject declared "ripe for codification" through coöperation with the Legal Section of the Secretariat of the League. The declaration ultimately signed by the states of the world on this point ought clearly to set forth the rule for the interpretation of treaties already in force and separately of those subsequently to be entered into. To date, the Fiscal Committee has not taken any positive steps to have this done.

§ 6. **Concerning the Responsibility of Fiscal Administrations.** The fifth conclusion is that each double taxation treaty of the future should contain, as many now contain, an article stating that for the carrying out of its provisions the competent fiscal authorities of the contracting states shall be responsible and that they shall have authority to come to agreements over disputed or previously unforeseen points instead of having the respective Foreign Offices handle them.

§ 7. **Concerning Optional Practices in Model Treaties.** The sixth conclusion is that draft convention I-a, I-b and I-c approved at Geneva are vastly superior to that ap-

proved at London in one outstanding particular. Instead of providing for a series of options they state positively what ought to be done. It is in the commentaries that provisions for exceptions are mentioned. The state that wants to deviate from the accepted model should have good reason for doing so. At any rate the responsibility for changing, on its behalf, a generally accepted principle would rest upon such a state.

§ 8. **Concerning Certain Public Officers and Public Employees.** The seventh conclusion is that there should be added to the provision that compensation of public officers and employees should be taxed only by the state employing them, the words "when nationals thereof" or other words of similar import. An illustration will be in point. In the American consulate at Geneva, American, Moranian, Imerian and Swiss nationals are employed. They are all paid out of funds appropriated by the Congress of the United States. It is reasonable that Switzerland should not tax the Americans employed in the Consulate at Geneva and that the United States should not tax Swiss citizens on similar work in the United States. But why should Switzerland be bound by treaty not to tax her own citizens, resident within her own borders, on income from services rendered in Switzerland, just because they are employed by the United States yet owing it no allegiance and legally only that loyalty that is incident to continued employment? Why should Switzerland be bound by such a treaty not to tax the Moranians and Imerians working at the American Consulate, when she taxes every other Moranian and Imerian within her borders receiving equivalent income?

§ 9. **Concerning the Taxation of Nonresident American Citizens.** The eighth conclusion is that the United States should give up its taxation of American citizens

resident abroad for three reasons. In the first place the continuation of the present system makes the United States a leading offender against putting into effect a sound program for relief from international double taxation. Secondly, such taxation leads to grave abuses of the high privilege of citizenship through serious disproportions in tax contributions on the part of conscientious citizens and those who are less so. To correct this injustice through adequate audits would be very expensive. Then, too, because of the Federal system of credit for foreign taxes paid and of exempting income actually earned abroad the amount of income tax so collected is small. The United States, Mexico, and Roumania are the only nations which subject to income tax their nonresident citizens.

§ 10. **Concerning the American Program.** The ninth conclusion is that, in accordance with the historic American tradition in tax matters, the United States ought to continue to provide in its revenue acts for the tax exemption of particular classes of persons or income, under conditions of reciprocity with foreign governments. This policy would keep economic and administrative principles to the fore in our tax law, at least in this sphere, and would tend to reduce to a minimum diplomatic representations and bargainings for the alleviation of tax burdens. The bill introduced into the House of Representatives in February 1930, discussed in the previous chapter, was worded in such a way as to harmonize with the recommendations of the General Meeting as expressed in Draft I-b, except that it was in the form of legislation, to be effective when accepted by reciprocal legislation abroad, instead of in the form of a bilateral treaty.

APPENDIX A

Mr. Cleminson (International Chamber of Commerce) said that the representatives of the International Chamber of Commerce attended the meeting in the capacity of business experts as opposed to the other members who were there as taxation experts.

As far as the final paragraph of Article 5 was concerned the commercial world had reached agreement upon its provisions and hoped that they would be adopted. The great shipping companies of the United States of America, Great Britain and other countries had asked for exceptional treatment, but the recommendation now under discussion was one put forward by commerce as a whole.

If shipowners viewed the matter solely from their own point of view, they would point out that as they paid taxes in their own countries the same taxes should be placed on their foreign competitors using the same ports.

It should not be forgotten that taxes imposed by countries without shipping would in the long run be paid by those countries themselves.

He would remind the meeting of its original terms of reference to be found on page 5, footnote 1, of Doc. 216.M.85. The League had been originally urged to take up the question of double taxation in order to encourage a flow of capital into those countries which needed it. The Financial Committee of the League, composed of some of the most eminent bankers in the world, had pointed out, when first consulted, that the flow of capital

from one country to another was being impeded by the taxation imposed by the borrowing country. A year later another point of view had been expressed by those countries which had not desired their capital to flow out of their borders. That view was expressed in the second footnote on the same page. The present meeting had now been asked to suggest not how to impose new taxes but how to avoid double taxation. The commercial community had made suggestions in regard to shipping, and if the Meeting wished to serve the interests of those countries which desired ships to visit them it would adopt the recommendation before it which was the most successful method of avoiding double taxation, as would be perceived from the following considerations.

To turn to the theoretical side, the origin of shipping profits was not the country of departure or of arrival but the field over which the goods were transported. In other words, profits were derived from service rendered. The country therefore whose flag the ships flew should be regarded as the country of profit.

On the practical side, it might be enquired whether it was possible to levy a tax on shipping. There were two kinds of ships, tramp steamers and liners. Tramp steamers visited almost every country, and therefore it was practically impossible to apportion their profits. Even liners traded with many countries. Mr. Cleminson had taken from the official shipping lists the average number of countries visited by a liner plying between Great Britain and Australia and had found the figure to be 6 or 7. In those circumstances how was it possible to apportion the profits of that ship between the various countries? Furthermore, ships were part of a fleet. Some of the units of that fleet might be showing a profit, others a deficit. How again, therefore, could the tax be calculated except in the country of origin?

It was also a matter of policy. It was a mistake to regard the basis of reciprocal agreements as being a basis of mutual exchange. Countries which had offered to exempt foreign shipping had done so because they thought that it was in their own interests to attract foreign ships to their ports. It was a remarkable fact that one-third of British exports were carried in foreign bottoms. England had never taxed tramp steamers, though she had taxed liners before the war. America had adopted a similar policy, with the result that she had enjoyed the lowest freights current since the war and had been enabled to build up a large overseas trade. In 1921 the United States of America had officially adopted the policy of non-taxation of foreign ships coming to American ports, though for political reasons they had subjected this concession to a stipulation requiring reciprocity. The British Government had followed suit two years later.

He would once more remind the meeting that it was not concerned with the negotiation of agreements but with the drafting of suggestions for model forms of conventions. The International Chamber of Commerce, therefore, suggested that the last paragraph of Article 5 should remain untouched and that the optional character of the relevant remark in the Commentary should be curtailed to mentioning nothing more than the ultimate extension to "river and lake navigation." Such an observation would, he thought, give satisfaction to the authorities of Java and other countries in a similar position.

The result of the work of the meeting of experts would be submitted to bankers and business men who would regard it as a basis for a business arrangement. The main difficulty encountered by the experts was the settlement of differences between what might be called residence countries and countries of origin. The fewer concessions made to residence countries the less chance was

there of model conventions being adopted in the negotiations of bilateral treaties. A cursory examination of the first convention would show that Articles 3, 4, 5, 6, 7 and 8 were drafted in favour of countries of origin and the remaining articles in favour of residence countries. The least, therefore, that the experts could do would be to leave unchanged the recommendation regarding shipping which constituted a concession to residence countries.

The representative of the Soviet Republics of Russia had asked whether shipping companies carrying on banking and other business transactions in a foreign country would fall under the operation of this clause. Mr. Cleminson had discussed the matter with him with the result that they had both agreed on the following form of words to be included in the Commentary:

> "If maritime navigation companies carry on other activities independent of shipping, for example the business of the sale of goods, banking or of a warehousekeeper, such activities will respectively be dealt with in accordance with the other provision of this convention."

The Chairman thanked Mr. Cleminson for his very interesting statement. He said that there would be a discussion at the following meeting.

APPENDIX B

Sir Samuel Instone (Director of Imperial Airways Ltd.) after thanking the meeting on behalf of the International Air Traffic Association for allowing him to present, through the International Chamber of Commerce, the point of view of air transport, said that he agreed with the amendments proposed by the Japanese Delegation. Further, the whole question of air traffic had been covered by the statement made by Mr. Cleminson, with the exception of one or two points.

Sir Samuel Instone would ask that the last paragraph of Article 5 should be amended to end with the words "this shall also apply to air transport concerned," and that the last paragraph but one in the Commentary should be altered in the same sense. He would also ask that the last paragraph in the Commentary should be excluded.

Everyone would recognize that air transport had not only arrived but was going to play a big part in the future, and it had been welcomed by all European countries alike because they did not want to be left out of this great development. He would suggest, therefore, that air transport should be placed on the same footing as shipping. He might give an example of double taxation applicable to the air. The aeroplane service from Holland to the East Indies had to cross several countries and come down for various reasons in different territories. If that service had to pay taxes in every country it crossed, there would be nothing left and the company

might as well sell its planes. Further, air transport companies received subsidies from their Governments, and would require such subsidies for many years to come. Their profits had to be made out of these subsidies, and it was inconceivable that any country could wish to tax the Government subsidies paid to air companies. He would wish to point out to those countries which had no air service that they derived great benefits from the air transport services of other countries passing through their own countries.

APPENDIX C

(H. R. 10165, Seventy-first Congress, Second Session.)

A BILL To reduce international double taxation.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the income of an individual who is a resident of a foreign country, or of a corporation created or organized in or under the law of a foreign country, shall be exempt from taxation by the United States if the Commissioner of International Revenue, with the approval of the Secretary of the Treasury, determines that such foreign country grants an equivalent exemption in respect of income of individuals who are residents of the United States, and of domestic corporations, except that the following shall not be exempt from taxation under this section:

(a) Income derived from any business, trade, or profession which is allocable to be a permanent establishment in the United States;

(b) Compensation for labor or personal services performed in the United States;

(c) Income derived from real property located in the United States or from any interest in such property, including rentals and royalties therefrom, gains from the sale or other disposition thereof, and interest on obligations (other than obligations of a corporation) secured by such property.

Sec. 2. Compensation paid by a foreign country to its citizens for labor or personal services performed in the United States shall not be included in gross income and shall be exempt from taxation by the United States if the Commissioner of International Revenue, with the approval of the Secretary of the Treasury, determines that such foreign country grants an equivalent exemption in respect of the compensation paid by the United States to its citizens for labor or services performed in such foreign country; and compensation paid by the United States which is thus exempt from taxation by a foreign country shall not be excluded from gross income under section 116 (a) of the revenue act of 1928.

Sec. 3. Pensions paid by a foreign country to an individual who is a resident of the United States shall not be included in gross income and shall be exempt from taxation by the United States if the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, determines that such foreign country grants an equivalent exemption in respect of pensions paid by the United States to residents in such foreign country.

Sec. 4. The income of an individual who is a resident of a foreign country, or of a corporation created or organized in or under the law of a foreign country, which consists exclusively of earnings derived from the operation of aircraft shall not be included in gross income and shall be exempt from taxation by the United States if the Commissioner of International Revenue, with the approval of the Secretary of the Treasury, determines that such foreign country grants an equivalent exemption to residents of the United States and to domestic corporations.

Sec. 5. (a) For the purposes of this act, a tax imposed in respect of the income of a corporation shall not be con-

sidered as imposed on the shareholder, whether or not such tax may be recouped by the corporation from the shareholder; but a tax imposed in respect of dividends distributed by a corporation shall be considered as imposed on the shareholder.

(b) If it is determined under this act that a foreign country grants an equivalent exemption and any income from sources within such country is on that account exempt from tax in such country, then such income shall not be considered as income from sources without the United States for the purposes of section 131 of the revenue act of 1928.

Sec. 6. The exemption under section 1 of this act shall be effected by the exclusion or deduction of the exempted items from gross income, in accordance with such regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury may prescribe. In the case of items of income which are subject to withholding at the source and which are exempt from taxation by the United States under this act, the Commissioner of Internal Revenue is authorized, if he determines to effect the exemption by way of deduction, to give effect to such exemption by refunding or crediting as an overpayment any tax paid in respect thereof, or by relieving the withholding agent of his obligation to withhold. There shall not be allowed as a deduction from gross income any deduction properly allocable to or chargeable against items of income which are exempt from tax by this act.

Sec. 7. Any determination under this act that a foreign country grants an equivalent exemption shall, unless revoked, be applicable to the taxable year in which such determination is made and to each taxable year thereafter.

Sec. 8. (a) Notwithstanding the fact that it is determined under section 1 of this act that a foreign country

grants an equivalent exemption in respect of a taxable year, an individual shall not be granted, for any part of such taxable year, the exemption under section 1 of this act unless he has been, for at least six months during such taxable year, a resident of such foreign country.

(b) As used in this act the term "permanent establishment" includes real centers of management, statutory offices or seats, branches, mines, oil wells, factories, workshops, warehouses, offices, agencies, and other fixed places of business; but the fact that an individual who is a resident of a foreign country, or a corporation created or organized in or under the law of a foreign country, has business dealings in the United States through a *bona fide* commission agent or broker shall not be held to mean that such individual or corporation has a permanent establishment in the United States. Income allocable to permanent establishments in the United States shall be determined in accordance with regulations prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury. If, in the opinion of the commissioner, a corporation has its real center of management in a country other than that in or under the laws of which it was created or organized, such corporation may be treated as if organized where its real center of management is situated.

(c) The terms used in this act shall have the same meaning as when used in the revenue act of 1928.

(d) This act may be cited as the "International double taxation relief act of 1930."

APPENDIX D

TEXT OF DRAFT CONVENTION NO. I-B

The present convention is designed to prevent double taxation as regards the following specified taxes in the case of taxpayers of the contracting States, whether nationals or otherwise.

(a) * * * * * * * * *
(b) * * * * * * * * *
(c) * * * * * * * * *

Article 1. Taxes at the Fiscal Domicile

A. In principle, income shall be taxable by the state in which the taxpayer has his fiscal domicile, i.e., his normal residence, the term "residence" being understood to mean a permanent home.

B. In the case of taxpayers who possess a fiscal domicile in both contracting states, the tax imposed in each of these States [shall be] in proportion to the period of stay during the fiscal year, or according to a division to be determined by agreement between the competent administrations.

Article 2. Taxes at Source

The following classes of incomes shall be taxable by priority at their respective sources as described below:

A. Income from Immovable Property.—The income from immovable property, i. e., that which corresponds

to the actual or presumed rental value of such property, as well as any other income from such property which is not covered by paragraph B below, shall be taxable in the state in which the property in question is situated.

This rule shall apply to income from mortgages or other similar claims.

B. Industrial, commercial, or agricultural income.—Income from any industrial, commercial, or agricultural undertaking, and from any other trades or professions not referred to in paragraph D, shall be taxable in the State in which a permanent establishment is situated.

The real centers of management, branches, mining and oil-fields, factories, workshops, agencies, warehouses, offices, depots, shall be regarded as permanent establishments. The fact that undertaking has business dealings with a foreign country through a *bona fide* agent of independent status (broker, commission agent, etc.) shall not be held to mean that the undertaking in question has a permanent establishment in that country.

Should the undertaking possess permanent establishments in both contracting states, each state shall impose the tax applicable to that part of the income produced on its territory. The competent administrations of the two contracting states shall come to an arrangement as to the basis for apportionment.

Nevertheless, income from maritime shipping and air navigation shall be taxable only in the state in which the real center of management is situated.

C. Fees of managers and directors.—The fees of managers and directors of joint-stock companies shall be taxable in the State where the real center of management of the undertaking is situated.

D. Salaries and wages.—Salaries, wages, or other remuneration of any kind shall be taxable in the state in which the recipients carry on their employment.

Salaries of officials and public employees who are serving abroad shall, however, be taxable in the state which pays these salaries.

E. Public pensions.—Public pensions shall be taxable in the state of the debtor of such income.

Article 3. Relief Through Deductions and Refunds

A. Deductions.—On reporting his or its total income from all sources, any person or company domiciled in the territory of one of the contracting states shall be granted relief in respect of taxes payable in the other contracting state on income taxable under Article 2 by priority in such other contracting state.

For this purpose the state of domicile shall deduct from its tax on the total income the lesser of the two following amounts:

(a) The tax imposed by the other contracting state on income taxable by priority therein; or

(b) An amount which represents the same proportion of the tax payable on the total income as the income taxable by priority bears to the total income.

B. Refunds.—The state which has collected an origin tax on revenues not enumerated under Article 2 shall refund the amount on production of proper evidence.

Article 4.

As regards any special provisions which may be necessary to enable the present convention to be applied, more particularly in cases not expressly provided for, the financial administrations of the two contracting states shall confer together and take the measures required in accordance with the spirit of the convention.

Article 5.

Should a dispute arise between the contracting states as to the interpretation or application of the provisions of the present convention, and should such dispute not be settled either directly between the states or by the employment of any other means of reaching agreement, the dispute may be submitted, with a view to an amicable settlement, to such technical body as the Council of the League of Nations may appoint for this purpose. This body will give an advisory opinion after hearing the parties and arranging a meeting between them if necessary.

The contracting states may agree, prior to the opening of such procedure, to regard the advisory opinion given by the said body as final. In the absence of such an agreement, the opinion shall not be binding upon the contracting states unless it is accepted by both, and they shall be free, after resort to such procedure or in lieu thereof, to have recourse to any arbitral or judicial procedure which they may select, including reference to the Permanent Court of International Justice as regards any matters which are within the competence of that court under its statute.

Neither the opening of the procedure before the body referred to above nor the opinion which it delivers shall in any case involve the suspension of the measures complained of; the same rule shall apply in the event of proceedings being taken before the Permanent Court of International Justice, unless the court decides otherwise under Article 41 of its statute.

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